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91-826

No. _____

Supreme Court, U.S.
FILED
NOV 18 1991
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In the Supreme Court of the United States
October Term, 1991

MARY SCHULDT and DOUGLAS SCHULDT
on behalf of themselves and their minor daughter,
ERIKA SCHULDT,

Petitioners

-v.-

MANKATO INDEPENDENT SCHOOL
DISTRICT NO. 77,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit decision, requiring Erika to re-exhaust administrative proceedings provided by the Education of the Handicapped Act (EHA), creates a conflict between the circuits, is contrary to the Act, and to the rulings of this Court.

2. Whether the Eighth Circuit's adoption of a harmless error standard and refusal to provide Erika a remedy for the school district's violations of the procedural safeguards guaranteed by the EHA creates a conflict with the other circuit courts and is contrary to the Act, and to the decisions of this Court.

3. Whether the Eighth Circuit's exclusion of Erika from her neighborhood school, solely because of its architectural barriers, is contrary to the EHA, decisions of this Court, lower courts, and administrative decisions.

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OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 937 F.2d 1357 (8th Cir. 1991) and included here as Appendix A. The denial of Rehearing is included as Appendix B. A Stipulation dismissing the Minnesota Commissioner of Education as a Defendant is included as Appendix C. The opinion of the District Court for the District of Minnesota is included as Appendix D. State and local administrative decisions are included in the appendices as items E, & F, respectively.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1991. A timely Petition for Rehearing was denied by Order entered August 20, 1991. This Court has jurisdiction under 28 U.S.C. § 1254. Under Rule 13 of this Court, this Petition for Certiorari is filed timely.

STATUTES AND REGULATIONS

This case involves the Education of the Handicapped Act (EHA), 20 U.S.C. §§ 1400-15;[1], regulations of the Department of Education enforcing the EHA, found at 34 C.F.R. parts 300, and Minn. Stat. § 120.17 and regulations. The significant portions of the statute and provisions are set forth in Appendix G.

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[1] In 1990, Congress changed the name of the EHA to the Individuals with Disabilities Education Act. Since the courts below referred to the Act as the EHA, we shall continue to do so in this Petition.

STATEMENT OF THE CASE

This case concerns Erika Schuldt, a nine-year old[2] child who has spina bifida. She has been excluded from her neighborhood school solely because she uses a wheelchair for mobility and the school has some architectural barriers. The school district made its decision to exclude Erika outside the legal process required by the EHA.[3]

Erika lives with her parents and siblings, five blocks from Roosevelt Elementary School. (E - 27, F - 6, 8) Erika has average intelligence. She receives occupational and physical therapy, and has an aide to assist with some mobility issues. (F - 6, 7) If she had no disability, Erika would attend Roosevelt, (F - 8) and then graduate to West Junior High and High School. Solely because of her disability, the

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[2] Erika is now nine years old and in third grade. This dispute began when she was age six, just before she was to begin her kindergarten year. (F - 3)

[3] The parties agree that Erika is a handicapped child within the meaning of the EHA.

District has required Erika to attend Kennedy Elementary School since her kindergarten year.[4] Kennedy is four miles from the Schuldt home, and Erika must travel there by a "special bus." (F - 9) Kennedy students proceed on to East Junior High and High School.

Erika is keenly aware that she is being treated differently, and has expressed great concern and displeasure at having to ride a bus to school while the other children in her neighborhood walk to school. Erika wants to attend Roosevelt in order to have a "normal pattern of socialization;" and to be able to go to school with neighborhood children, friends and siblings. (E - 18, F - 33) Because independent mobility is a continuing goal for Erika, her parents planned to use the short distance to Roosevelt to encourage Erika's safe use of her wheelchair in the community.

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[4] Erika's parents agreed to her attendance there only during the pendency of this case. (F - 37)

Roosevelt School is a two-story building that houses kindergarten through sixth grade classes. (E - 25) Erika can access the kindergarten wing and cafeteria because each has ground floor access. Erika could access the classrooms and programs on the first and second floors of the building if classrooms were moved and ramps added or both. (F - 106)

In the Spring of 1988, Erika's parents told the District that they wanted Erika to attend Roosevelt Elementary School for the 1988 - 89 school year. (F - 20, 21) On June 16, 1988, the District's Director of Special Education sent the Schuldts a letter requiring Erika to attend kindergarten at Washington Elementary School, Kennedy Elementary School or Hoover Elementary School. (F - 27, 28) This letter suggested a substantial change in placement and was the only written notice concerning Erika's 1988 - 89 individual educational placement ("IEP") that the parents received before

the 1988 - 89 school year began. The letter did not contain[5]: (1) notice of the Schuldts' procedural rights; (2) the required response form; (3) a copy of Erika's IEP; (4) a description of the other options considered and the reasons for their rejection; and (5) did not even mention Erika's request that she be permitted to attend Roosevelt Elementary. (F - 89, 90)

The June 16, 1988 placement proposal was not the result of any recommendation made by Erika's IEP team and was not based on an assessment of her needs. Although there had been two meetings, in February and May 1988, those meetings were not meetings under the requirements of state and federal law according to the Minnesota Commissioner of Education because there was no administrator. (E - 45) Erika's IEP for the 1988 - 89 school year was not developed until October 25, 1988, four months after the District admin-

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[5] This notice is required by the EHA, 20 U.S.C. § 1415 (b)(1)(C), (D) and its accompanying regulations at 34 C.F.R. §§ 300.504, 505.

istrator had made his placement decision and only after Erika had started at Kennedy pending a due process hearing request. (F - 37, 93)

Nor was the June placement proposal based on the feasibility of modifying Roosevelt. At the time it was made, the School District had not yet even retained any professional to advise them on that issue. (F - 102) Only after the Schuldts objected to the June proposal, did the District consult professionals on accessibility. During the course of the dispute, both an architect and an accessibility expert reviewed Roosevelt, and both concluded that the building could be made accessible at modest cost. (F - 107, 109, 110)[6]

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[6] The school district's regular architect advised that access to the kindergarten area required only minor changes because it was on the ground floor. To access the rest of the building, he suggested an elevator but conceded that a ramp and moving classrooms would work. The accessibility specialist concluded that the first and second floor could be made accessible through structural changes (a lift, ramps, or elevator) and programmatic modifications, such as moving classrooms.

On August 10, 1988, the Schuldts requested a conciliation conference to resolve the issue of Erika's placement for the 1988 - 89 school year. (F - 28, 29) The parents, and two school administrators attended the conference on August 19, 1988. (F - 30) The special education director prepared a memorandum of the conference which he later acknowledged constituted a proposal of a substantial change in placement. In the memo, he admitted that "the educational program that Erika needs is available at each elementary school in the District" and that " it is agreed that Roosevelt could be modified to permit full accessibility," but again refused the Schuldts' request that Erika attend Roosevelt Elementary School and instead, proposed placement at Washington Elementary School. (F - 33, 34, 35) This placement decision was not based primarily upon the cost or feasability of modification. Indeed, two of the justifications listed were:

> "...the very existence of ramps, elevators and other physical modifications and adaptations

> tend to magnify the differences between children in wheelchairs and able-bodied children."

and

> "...Over the years, several children with mobility problems such as Erika's have been ... served in the school."

The Schuldts rejected this proposal and on September 7, 1988, requested a due process hearing. In the meantime, because they had no other alternative, they permitted Erika to attend Kennedy pending resolution of the dispute. (F - 37)

After the hearing had been requested, on October 25, 1988, a meeting was held for the members of Erika's IEP team to develop a new Individual Education Plan ("IEP") for her. The Assistant Special Education Director, permitted no discussion at the meeting concerning Erika's placement. (F - 39, 40) The Special Education Director was not present at the meeting and was not a member of Erika's team, but nevertheless drafted the section of the proposed IEP relating to Erika's placement. The justifications for Erika's placement

did not rely on any of the team's discussion and were nearly identical to the prior justifications set forth in his prior memorandum. The program proposed in this IEP constituted a substantial change in placement and all notice requirements therefore applied. (E - 43)

On February 2, 1989, less than one month before the due process hearing was to begin, a meeting was held to review Erika's educational program in light of the accessibility assessment which had recently been completed. (F - 46) The meeting was attended by all the members of Erika's then-current IEP team, including -- for the first time -- the Special Education Director. The team did not make a recommendation concerning Erika's placement at or after this meeting, despite the fact that previously the team had repeatedly recommended Roosevelt as the placement for Erika. The Special Education Director wrote an undated and unsigned summary of this meeting and sent it to the Schuldts

eight days before the hearing was scheduled to begin. No written proposal concerning Erika's placement was ever sent to the Schuldts after the February 2, 1989 team meeting.

PROCEEDINGS BELOW

An impartial due process hearing was held on February 27, 1989 through March 2, 1989. The Hearing Officer found that the District failed to comply with the procedural requirements of federal and state law, that Roosevelt could be made accessible to Erika, that cost was not a factor, and ordered the District to develop a new IEP consistent with this finding. The District appealed to the Commissioner of Education, who agreed that the District had violated Erika's procedural rights, but in reliance on § 504 of the Rehabilitation Act did not require the District to modify Roosevelt.

The Schuldts then brought an action in United States Federal District Court (MN) for a *de novo* determination of the issues raised at the administrative level as well as a

determination of the appropriateness of the Commissioner's involvement in the hearing review process. The case was submitted to the District Court on the record, with oral argument heard on December 1, 1989. On February 23, 1990, the lower court issued her decision holding that (1) it was unnecessary to reach the issue of whether the district's failure to follow the Act's procedures denied Erika a free appropriate public education, because Erika had "waived" remand, and (2) that it was permissible for the School District to single Erika out on the basis of her disability and forcibly bus her to a school outside her neighborhood based on the District's alleged cost of modifying Roosevelt.

The Schuldts timely filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit on March 26, 1990.[7]

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[7] Subsequently, the Schuldts reached an agreement with the Commissioner of Education, and have dismissed the Commissioner as a party to this action. (See Appendix B)

The Court of Appeals rendered its decision on July 5, 1991. The Court held that (1) Erika waived certain procedural rights by refusing to re-exhaust administrative proceedings; (2) that although the District violated those rights, it was not required to provide her a remedy; (3) that Erika could not refute the District's claim of adherence to § 504; and (4) that it was proper for the District Court to consider the costs, of any modifications to Roosevelt even though the District had conceded at the due process hearing (the only record developed in the case) that cost was not a factor.

ARGUMENT

This case presents three important questions about a school district's responsibility to a child with a disability under the Education for the Handicapped Act (EHA). The first issue is once the child reaches a trial court, after having exhausted all administrative proceedings, must the court decide the matter and grant any relief or can the court require

the child to return again to the administrative proceedings. The second issue is whether it is harmless error for a school district to decide a child's placement in a manner that violates the procedures required by the EHA. The third issue is whether courts can use a simple cost-benefit analysis to decide if a school district has a compelling justification to exclude a wheelchair user from a neighborhood school because of some removable architectural barriers. The majority below has decided each of these issues in a way that creates a conflict among the circuits and violates the language and intent of the EHA. If the Eighth Circuit's interpretation stands, then on each of these issues very different requirements will be imposed on school districts in different parts of the country.

I. THE COURTS BELOW REQUIRED ERIKA TO "RE-EXHAUST" ADMINISTRATIVE PROCEEDINGS CREATING A CONFLICT WITH OTHER CIRCUIT COURTS AND CONTRARY TO THE EHA AND *BOARD OF EDUCATION V. ROWLEY.*

The decision below creates a conflict among the circuit courts and differs with the rulings of at least two district courts. It requires Erika to reexhaust administrative proceedings after reaching the trial court. Here, the District Court refused to consider what impact the school district's violations had on Erika because, it claimed, "...plaintiffs waived their possible right to remand based on the District's failure to follow the Act's procedural safeguards." (D - 15) The Eighth Circuit concluded that:

> "Furthermore, the failure of the school district to comply with procedural requirements, of necessity, would require remand for further consideration. Yet, as the district court observed, the Schuldts waived their right to a remand to correct the procedural defects." (A-9, 10)

This decision conflicts with other circuits holding that once a dispute of this nature reaches a District Court, it should be resolved there.

The Third Circuit has ruled that it would be inconsistent with the statutory scheme of the EHA to allow a state agency to remand an issue back to an administrative hearing officer, particularly, in light of the Act's emphasis on a prompt resolution of the dispute.[8] The Fourth Circuit has held that, unlike other administrative statutes, the EHA does not require re-exhaustion.[9] As the Fourth Circuit explained:

> We hold the district court is in error for two reasons. First, since the scope of the district court's review under the EHA is more broad than that generally existent under review of administrative decisions, the need for exhaus-

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[8] *Muth v. Smith*, 646 F.Supp. 280 (E.D. Pa. 1986) aff'd in part remanded in part (for calculation of attorneys' fees) *sub nom. Muth v. Central Bucks School District*, 839 F.2d 113 (3d Cir. 1988) rev'd on other grounds *sub nom, Dellmuth v. Muth*, 105 L.Ed 2d 181 (1988).

[9] *DeVries v. Spillane*, 853 F.2d 364 (4th Cir. 1988).

> tion is not as clear as it is in the normal case of review of administrative decisions. Second, even under normal rules, the plaintiff does not need to reexhaust. The new IEP continues to provide for plaintiff's schooling at a place other than Annandale. Thus, the complaint of plaintiff, before the administrative tribunals, is the same as that before the district court...
>
> *DeVries* at 267.

Both remand and re-exhaustion would be inconsistent with the statute when the complaint remains the same, though the IEPs change.

Moreover, the panel's decision is clearly contrary to the language and structure of the EHA's judicial review provision. This Court recently reiterated its rule that if a statute contains an unambiguous phrase, a court must enforce it according to its terms[10] The EHA is clear. It provides:

> "...In any action brought under this paragraph, the court shall receive the records of the

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[10] (*Arcadia, Ohio v. Ohio Power Co*, 111 S.Ct. 415, 416 (1990) and see: *I.N.S. v. Pangilinan*, 108 S.Ct. 2210, 2212 (1988) (Courts cannot disregard statutory provisions.)

> administrative proceedings, shall hear additional evidence....and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."
>
> 20 U.S.C. § 1415(e)(2)

Thus, a remand to administrative proceedings is not contemplated once a matter has proceeded through that process and has reached a trial court. The district court's ability to receive new evidence expresses Congressional desire to provide a mechanism for prompt resolution consistent with the view that the district court must decide the matter, rather than return it to additional administrative proceedings.

Indeed, this Court, in *Board of Education v. Rowley*, 458 U.S. 176, 188[11] (1982) held that a District Court re-

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[11] In its opinion, the *Rowley* Court explained:

> "Judicial review invariably takes more than nine months to complete, not to mention the time consumed during the preceding state administrative hearings. The District Court thus correctly ruled that it retained jurisdiction to grant relief because the alleged deficiencies

viewing an agency decision under the EHA, could retain jurisdiction to grant relief, rather than remanding the matter to the administrative agency as is normally the case.

To require Erika to return to administrative proceedings to obtain any relief for the procedural violations was therefore in error. The District Court had authority to and should have determined what impact the violations had on Erika and granted appropriate relief. The panel below limits the ability of the District Court to grant relief as the *Rowley* Court directed. Because the decision creates a conflict among the circuits, is in conflict with the Court's ruling in *Rowley*, and is contrary to the structure of the EHA, the Court should grant the Petition.

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in the IEP were capable of repetition as to the parties before it yet evading review."

II. THE EIGHTH CIRCUIT ERRED BY ADOPTING A HARMLESS ERROR STANDARD WHEN A SCHOOL DISTRICT VIOLATES THE EHA PROCEDURES.

The Eighth Circuit has applied a harmless error standard when a school district violates the EHA's procedural safeguards. This creates a dispute between the circuit courts and is contrary to decisions of this Court interpreting the EHA. For these reasons, the Petition for Certiorari should be granted.

Essentially, the circuit courts disagree about the standard to be applied and the relief available when a school district violates the EHA's procedures. The Eighth Circuit has condoned as harmless error this school district's blatant disregard of the EHA's comprehensive procedures and the exclusion of Erika's parents from the decision-making process. The school district violated the Act in two ways: (1) it failed to provide Erika notice of the change in her educational placement; and (2) it permitted a single adminis-

trator to erroneously decide[12] her placement, instead of her IEP team. By these actions, it effectively prevented Erika's parents from participation in the decision-making process until after the school district had committed itself to excluding Erika from Roosevelt.[13] Both the Minnesota Commissioner of Education and the local hearing officer held that the District had violated the EHA and state law by these actions. (E - 45) Despite the violations, the Eighth Circuit held the actions were harmless error and permitted the district to

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[12] The administrator concluded that Erika could not attend her neighborhood school because of insurmountable architectural barriers. However the hearing officer concluded that with removal of the barriers, Erika could be educated at Roosevelt.

[13] The local hearing officer concluded that: ". . .by failing to develop Erika's program plan before making its placement proposals and placement determination, by failing to develop the plan in advance of the start of the 1988-89 school year, by failing to provide the Parents with proper notice, and by deviating from the team decision-making process, the School District excluded the IEP team, including the Parents, from meaningful participation" in deciding Erika's kindergarten placement. (F - 95)

circumvent the EHA mandated process to determine Erika's placement. The courts below declined to offer Erika any remedy for the violations.

This decision conflicts with decisions of other circuits. The Fourth Circuit has repeatedly held that denial of the procedural safeguards is tantamount to a denial of a free appropriate public education.[14] The manner by which Erika's placement decision was made is almost identical to the situation in the Fourth Circuit case of *Spielberg v. Henrico*, 853 F.2d 256 (4th Cir. 1988). There the court held that because the school district violated the EHA process required to make the placement decision, the child had been denied a free appropriate public education. As a result, the Fourth Circuit permitted the District Court to grant as relief

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[14] *Spielberg v. Henrico*, 853 F.2d 256 (4th Cir. 1988); *Hall v. Vance Co.*, 774 F.2d 629 (4th Cir. 1985); *Tice v. Botetourt Co. School Board*, 908 F.2d 1200 (4th Cir. 1990); *Hudson v. Wilson*, 828 F.2d 1059, 1063 (4th Cir. 1987); *Bd. of Education of Cabell Co. v. Dienelt*, 843 F.2d 813 (4th Cir. 1988).

the placement requested by the child. Similarly, the Fifth Circuit has ruled that the EHA procedures are more than mere "hoops" through which a school district must jump; the adherence to EHA procedures is itself a safeguard. In *Jackson v. Franklin County School Board*, 806 F.2d 623, 580 (5th Cir. 1986) the Fifth Circuit affirmed that violations of the EHA process had occurred and remanded the case to the district court to determine if the child had suffered harm from the violations and to order relief accordingly.

In contrast, the Sixth Circuit has adopted a standard requiring school districts to show merely "adequate compliance" with safeguards as long as parents are not excluded from the decision-making process. Yet, even under this standard, Erika would be entitled to a remedy since a single administrator, not Erika's team, including her parents, made the placement decision.

Even if the Court deems it inappropriate to allow the remedy Eirka seeks, this Court should not allow the Eighth Circuit's harmless error decision to stand because that standard is contrary to the fundamental purpose of the EHA. The EHA is largely a procedural statute by which Congress mandated a substantive right to education for children with disabilities.[15] The "centerpiece of the statute's delivery system" is the Individualized Education Program (IEP).[16] The IEP is the "key provision"[17] of the EHA and "guarantees parents . . . an opportunity for meaningful input into all decisions affecting their child's education, "from evaluation to placement."[18] The Act requires the IEP team, including

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[15] *Board of Education v. Rowley*, 458 U.S. 176, 181 (1982).

[16] *Honig v. Doe*, 484 U.S. 305, 311 (1988).

[17] *Christopher W. v. Portsmouth School Comm*, 877 F.2d 1089, 1090 (C.A.I, 1989).

[18] *Honig v. Doe*, 484 U.S. 305, 311 (1988).

the child's parents,[19] to tailor the child's program to his individual needs, providing educational and related services and determining placement.[20] According to this Court, courts cannot disregard statutory provisions.[21]

Indeed this Court has repeatedly emphasized that school districts must follow the IEP team process, especially to ensure parental participation.[22] The first question to be answered by courts reviewing this kind of dispute is whether

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[19] 20 U.S.C. § 1401 (16); *Battle v. Pennsylvania*, 629 F.2d 269, 280 (3d Cir. 1980) cert denied, 452 U.S. 968 (1981).

[20] 20 U.S.C. §§ 1400 (c), 1401 (17), 1412 (5) (B), 1413(C) (3), 1414 (a) (1) (C) (iv); 34 C.F.R. § 300.551 (B) (2). *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 889-93 (1984).

[21] *I.N.S. v. Pangilinan*, 108 S.Ct. 2210, 2212 (1988).

[22] *Town of Burlington v. Massachusetts*, 736 F.2d 773, 783 (1st Cir. 1984)(exclusion of parents drives a stake into the very heart of the Act) aff'd 471 U.S. 359 (1985).

the school district complied with the procedures.[23] These procedures were developed in response to one of the original reasons for the EHA -- that is to ensure inclusion of parents in the process.[24] Most recently, this Court, in *Honig v. Doe*, explained that the Act establishes a "comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their children" and that "EHA assistance is conditioned on compliance with the procedural goals of the Act.[25]

To permit a harmless error standard to be upheld when, as here, the Schuldts were effectively excluded by the procedural violations until after the District had made Erika's placement decision erodes the meaningful participation by parents intended by the EHA.

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[23] *Board of Education v. Rowley*, 458 U.S. 176, (1982).

[24] *Mills v. Board of Educ. of the Dist. of Col.*, 348 F.Supp. 866, (U.S. Dist. Ct. D.C. 1972).

[25] *Honig, Id.*

As a result of this conflict and the discrepancies on a matter that is central to the way that parents and school districts go about the business of planning programs for children with disabilities, it is critical that the Court grant Certiorari to establish a standard for relief where procedural safeguards have been violated.

III. THE DECISION BELOW ADOPTS A COST-BENEFIT ANALYSIS AND CREATES A CONFLICT BETWEEN THE CIRCUITS AND WITH THE OFFICE OF SPECIAL EDUCATION AND OTHER ADMINISTRATIVE RULINGS.

The Petition should be granted because the decision below used the wrong standard - that of a cost-benefit analysis. This conflicts with the EHA rulings by this Court, other circuit courts, the Federal Office of Special Education, and other administrative rulings.

The cost-benefit analysis was inappropriate in this case for two reasons. First, that analysis has previously been confined to use by courts when deciding whether a school

district must provide expensive, recurring special services for a single child.[26] Here, the school district was asked to provide a one-time, nonrecurring expenditure to remove architectural barriers that would obviously benefit other individuals besides Erika. If the simple cost-benefit analysis is allowed to stand, the balance will always tip in favor of the school district because the analysis assumes benefit to a single child. It also erroneously assumes the same funding source for services is used for capital improvements, so that an expenditure to remove barriers in a school would result in less services to children in the school. The analysis is not correct in school accessibility siutations and conflicts with the intent of the EHA which itself provides a separate funding mechanism for such improvements. 20 U.S.C. § 1406. The decision also conflicts with directives of the Office of Special Education and with other administrative rulings. Moreover,

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[26] *N.W. ex. rel. A.W. v. Northwest R-1 School Dist*, 813 F.2d 148, 161 (8th Cir. 1987)

the lower courts failed to require the school district to show a compelling justification to exclude Erika from her neighborhood school. The school district did not introduce any evidence that it could not afford to remove the barriers. Indeed, it admitted it could afford to do so. The lower courts simply adopted the cost-benefit analysis without regard to the facts of the case. Erika has been wrongfully excluded on an erroneous assumption that the cost of architectural barrier removal would be excessive and would be exclusively for her benefit.

In short, the Eighth Circuit has condoned this school district's practice of excluding children who use wheelchairs from certain school buildings. This practice is a vestige of the exclusion historically placed on these children who, in most states, including Minnesota, were initially excluded from the public schools altogether.[27] Later, these children attend-

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[27] Minn. Acts, Ch. 81, §§ 2-4 (1907)

ed separate schools because it was thought they could not be educated in the regular classes.[28] It is little wonder then, that schools built during that time, are not accessible to children with disabilities.

Children with orthopedic impairments, like Erika, were among the children for whom the EHA was originally written. 20 U.S.C. § 1401(a)(1)(A) Accordingly, and as this Court has itself recognized, in *Irving Independent School District v. Tatro*,[29] Congress statutorily provided funds to remove architectural barriers in school buildings "...[T]he Act specifically authorizes grants for schools to alter buildings and equipment to make them accessible to the handi-

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[28] Minn. Rev. Laws 1905, § 1914; Mason's Minn. Statutes 1927 Vol. 4, § 2899 (Schools for Crippled Children)

[29] *Irving Independent School District v. Tatro*, 104 S.Ct. 3371, (1984); and see: *Turillo v. Tyson*, 535 F. Supp. 577 (1982).

capped. 20 U.S.C. § 1406..."[30] The language permits the Secretary of Education to provide funding to "pay part or all of the cost of altering existing buildings."[31] (emphasis added) Thus, Congress was not unmindful of the financial burdens which opening the public schools to children with disabilties imposed and enacted the law to encourage accessible schools.

In addition to the explicit language of the Act, the intent of Congress was:

> "The Committee believes that the removal of such barriers is necessary to assure certain handicapped children a free appropriate public education in the least restrictive environment and that barriers to accessibility should not be the cause which prevents appropriate education of such children with their nonhandicapped peers." S.Rep. No. 168, 94th Congress, 1st Sess. 38 (1975) U.S.C.C. & A.N. 1461 - 1462 (emphasis added)

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[30] *Id.* at 3376.

[31] Congress even defined "construction" as including both the erection of new structures and the remodeling of old ones. 20 U.S.C. § 1401(a)(4); § 1404.

In appropriating additional funds for this program in 1983, the Committee on Education noted that such removal or alteration of barriers in existing education buildings was necessary as a step towards "achieving accessibility for handicapped students." H.Rep. No. 410, 98th Cong., 1st Sess. 5 (1983) U.S.C.C. & A.N. 2092 Thus, the framers of the EHA intended to remove this vestage of discrimination as indicated by § 1406.

In reliance on this intent the agency charged with its administration, the Office of Special Education of the Department of Education, specifically addressed this precise issue, explaining that:[32]

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[32] OSEP also noted that:

> The criterion used for determining the appropriate implementation of the LRE (least restrictive environment) requirement under P.L. 94-142 (the EHA) is not the number of schools within a district which are accessible, but rather whether each handicapped child within a district is appropriately placed. A handicapped child should attend the school he/she would attend if not handicapped unless

> "It would not be in agreement with the intent of P.L. 94-142 . . . to deny a child placement in the school closest to his/her home because of accessibility."
>
> U.S. Office of Special Education Policy Letter [1980] Ed. Hdcp. L. Rep. 211:249

The holding of the Court below is contrary to the decisions of other courts of appeals that "[I]t is fundamental to the scheme and purpose of the [EHA] that handicapped children be provided the same educational opportunity" as nondisabled students. *Hawaii Dept. of Education v. Katherine D.*, 727 F.2d 809, 817 (9th Cir. 1983). A student must be provided a "classroom physically accessible" to her and cannot be denied access to her regular community school without "a compelling educational justification." *Tokarcik v. Forest Hills School District*, 665 F.2d 443, 455-56, 458 (3d Cir. 1981). A central component of the EHA's equality guarantee is that students with disabilities be permitted to "go

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> the services required to meet his/her unique needs cannot be provided within the school.

through the educational process with their peers," 20 U.S.C. § 1400(b)(4). The EHA mandates a community school for Erika "to the maximum extent practicable," 20 U.S.C. § 1414(a)(1)(C)(iv), unless providing the service there is "plainly untenable," *Evans v. School District No. 17*, 841 F.2d 824, 832 (8th Cir. 1988); accord, *DeVries v. Fairfax County School Board*, 882 F.2d 876 (4th Cir. 1989). This burden was never met by the school district because the courts used the wrong standard, a simple cost-benefit analysis.

Clearly, as OSEP found, the EHA rule requires the school district to insure that Erika is educated "as close as possible to [her] home," 34 C.F.R. § 300.552(a)(3), and that, unless Erika's IEP "requires some other arrangement," she attend the school she would attend if she were not disabled, *Id.* § 300.552(c). The only reason Erika is forced to attend Kennedy is because the School District is unwilling to modify

the Roosevelt building. The requirement of 34 C.F.R. § 300.552, may be abrogated only if "the removal from a community school. . . is the only way the plaintiff's needs can by met." *Miller v. Fairfax County School Board*, (1988-89) Ed. Hdcp. L. Rep. 441:333, 336 (E.D.Va. 1989) (emphasis added); see also *Thornock*, (1984-85) Ed. Hdcp. L. Rep. at 556:482.

The Eighth Circuit's decision boils down to an assertion that the clear intent of the EHA must yield to administrative convenience. That was the only factor the panel really considered. Clearly, the key purpose of the EHA was to open the schools to students with physical disabilities, so that nondisabled children would learn about disability and the acceptance of diversity, to their own benefit and that of students like Erika. As Senator Stafford explained in floor debate on the EHA:

> "I firmly believe that if we are to teach all of our children to love and understand one each

> other, we must give them every opportunity to see what 'different' children are like. If we allow and, indeed, encourage handicapped children and nonhandicapped children to be educated together as early as possible, their attitudes toward each other in later life will not be such obstacles to overcome." 121 Cong. Rec. 19,484 (1975).

The intent was to stimulate understanding and acceptance of disability and diminish the "heartbreak and suffering that accompany isolation and ostracism." *Id.*, at 19,503 (Sen. Cranston). The EHA was to accomplish this by making students with disabilities "part of the pattern, the rhythm, the assumptions of everyday life. *Id.* at 37,411 (Sen. Stafford). The Eighth Circuit's ruling, requiring only Erika to board a segregated bus to be transported out of her community, thereby reenforcing all the stereotypes and fears and prejudices about disability, not only fails to implement this central purpose, but undermines it. See e.g., *Hairston v. Drosick*, 423 F.Supp. 180, 181-84, (S.D.W. Va., 1976) If the Eighth Circuit's decision is upheld, Roosevelt students never will

understand what it is like to have a classmate who uses a wheelchair since the decision effectively bars wheelchair users from that school.[33]

At the very least, this Court should not condone an interpretation of the EHA which allows this "cost-benefit analysis" to govern in neighborhood school accessibility cases where the costs will be non-recurring expenditures and will benefit more than one person. The Department of Education has decided that, in enforcing the "as close to home as possible" requirement, "[f]inancial concerns cannot be the basis for making a placement decision." (1978) Ed. Hdcp. L. Rep. 211:84, 85. Nor can fund shortages "be permitted to bear more heavily on the . . . handicapped child than on the normal child." *Mills v. Board of Education*, 348 F.Supp. 866, 875-76 (D.D.C. 1972). The Eighth Circuit

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[33] Erika's case manager testified that no other children in Erika's neighborhood are required to ride a bus to school.

should not be able to use the cost-benefit analysis as a consideration, since it has already been held that a school district "may not use lack of available funds as a justification." *Parks v. Pavkovic*, 536 F.Supp. 296, 303 n.15 (N.D.Ill. 1982).

Finally, the Petition should be granted because the panel's decision conflicts with instructive administrative decisions on this issue. In *San Antonio Independent School District*, 17 EHLR 1168, (July 31, 1991) the hearing officer, like the hearing officer in this case,[34] held that the school district's decision to bar a child with muscular dystrophy who uses a wheelchair from a school based solely upon the

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[34] "In the present case, the School District's main witness testified that cost was not a factor, that the school district had the resources to make the structural modifications. Furthermore, the modifications made to the Roosevelt building would potentially benefit not only Erika, but any elementary aged child within that attendance area, and potentially throughout the west service area of the school district, where no elementary schools serving all grades, K-6, are currently handicapped accessible." (F - 110, 111)

school's inaccessibility was impermissible under the EHA. The hearing officer concluded that the school could be made accessible by making a non-recurring expenditure, benefitting other wheelchair using children and adults in the future, and that this would fulfill the intent of the EHA. *Id.* Similarly, at least two other hearing officers have permitted a child with an orthopedic disability to attend her neighborhood school, rather than be bussed to another school, even though the neighborhood school required some modifications or would not be fully accessible.[35] While these are not court decisions, they are instructive as the first step in the administrative process required under the EHA and demonstrate that if the Eighth Circuit's interpretation of the EHA stands, very

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[35] In Re: *Ind. Sch. Dist. No. 77* Dec. 10, 1981 (MN), 3 EHLR 303:144 (the remedy is to make the facility accessible, not to move the student); *School District #24 of Colfax Cty. v. Husband and Wife* (Neb), 1983-84 EHLR Dec. 505:296 (February 1, 1984) (child could attend neighborhood school, even though there were barriers.)

different requirements will be imposed upon school districts in different parts of the country. In the Eighth Circuit, a school district may justify a decision similar to that made here with no evidence but simply a cost-benefit argument. It may violate the IEP and refuse to listen to the parents' benefit arguments without reprecussion, as long as the district court later deems that a cost-benefit assumption was correct.

In other states, consistent with the language, and legislative history of the EHA and as expressed in § 300.552(d), the school district will bear the burden of demonstrating a compelling educational jurisfication for its decision. So that as the hearing officer in *San Antonio* explained:

> ". . . we consider. . . whether or not these are educational policy choices; or whether . . . they are decisions only concerning steps, wood, concrete and ramps. . . . That, I don't believe, is the type of legitimate choice that Congress intended to leave solely to the states. This case presents as much of an engineering choice as it does an educational choice."

The school district in the present case was not required to nor did it show a compelling educational justification. For that reason and because of the conflict between this decison, and the EHA, the OSEP ruling and rulings of both other courts and administrative rulings, this Court should grant the Petition, reverse the Eighth Circuit's decision and remand to the district court for further proceedings.

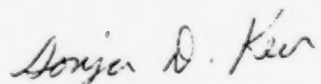
CONCLUSION

Petitioners have shown that a rejection of this application for a Writ of Certiorari to the Eighth Circuit Court of Appeals will result in harm to Erika because her rights under the EHA have clearly been violated but she has received no remedy. The panel's decision conflicts with other circuits in three ways. First, it requires Erika to return to the IEP team process and other administrative proceedings to obtain resolution or any remedy even though those proceedings have proved futile and even though the District Court, under the

EHA, and as interpreted by the Third and Fourth Circuits, can provide relief as appropriate. Second, it promotes a "harmless error" standard when a school district violates the EHA, in direct conflict with strict compliance standards of the Fourth and Fifth Circuits. Third, it adopts a simple cost-benefit analysis that is inappropriate since no evidence of the effect of modification costs on the school district's budget was ever presented. The analysis itself is contrary to the intent of the EHA that each child attend his neighborhood school unless there is a compelling educational justification to send the child elsewhere. Alterations to a school building to ensure physical accessibility cannot meet this argument. For all of these reasons, but particularly because of the split

between the circuits on each of them, this Court should grant the Petition for Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that three (3) copies of the above and foregoing Petition for Writ of Certiorari and accompanying Appendix have been mailed, postage prepaid, via First Class Mail to counsel for the other party, Mankato Independent School District No. 77, to wit:

Paul Ratwik
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Dated: November 13, 1991

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APPENDICES

Appendix A

Order of the U.S. Court of Appeals
For the Eighth Circuit

July 5, 1991

United States Court of Appeals
FOR THE EIGHTH CIRCUIT
No. 90-5146

Mary Schuldt and Douglas Schuldt, on behalf of themselves and their minor daughter, Erika Schuldt,	*	
Appellants,	*	Appeal from the United States District Court for the District of Minnesota.
v.	*	
Mankato Independent School District No. 77,	*	
Appellee.	*	

Submitted: December 13, 1990
Filed: July 5, 1991

Before McMILLIAN and JOHN R. GIBSON, Circuit Judges, and MORRIS S. ARNOLD*, District Judge.

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* The HONORABLE MORRIS S. ARNOLD, United States District Judge for the Western District of

Mary and Douglas Schuldt, parents of Erika Schuldt, appeal from a judgment of the district court[1] denying their claims against Mankato Independent School District Number 77 and Ruth Randall, Commissioner of the Minnesota Department of Education, alleging violation of the Education of the Handicapped Act, 20 U.S.C. §§ 1400-85 (1988) (amended in 1991 to be named the "Individuals with Disabilities Education Act"), Minn. Stat. Ann. § 120.17 (Supp. 1991) and 42 U.S.C. § 1983 (1988). These claims arose when the Mankato School District placed the Schuldts' handicapped daughter Erika in an elementary school other than her neighborhood school, because the neighborhood school is not adequately accessible to students with Erika's limited physical mobility.

The Schuldts brought this action to compel the school

Arkansas, sitting by designation.

[1] The Honorable Diana E. Murphy, United States District Judge for the District of Minnesota.

district to modify Roosevelt to make it accessible to Erika. The district court found that the school district and state educational authorities failed to follow some state and federal procedural requirements when deciding where Erika should attend school. In spite of these procedural defects, the court denied relief because it found that the school district is providing Erika with a free appropriate public education in the least restrictive environment available, thereby complying with the ultimate purpose of the Education for the Handicapped Act. *Schuldt v. Mankato Indep. School Dist. No. 77*, No. 4-89-636, slip op. at 13 (D. Minn. Feb. 23, 1990). We affirm the district court's decision.

Nine-year old Erika Schuldt was born with spina bifida, which paralyzed her from the waist down. Erika uses a lightweight wheelchair and her condition requires regular physical therapy, catheterization, and bowel care. The Schuldts live about five blocks from the Roosevelt elementary

school, and when the time came for Erika to go to kindergarten, her parents notified the school district that they wanted Erika to attend Roosevelt.

The Schuldts discussed the matter with several members of the school district's administration and learned that without modification, Roosevelt could not accommodate Erika due to her physical limitations.[2] On June 16, 1988, Lyle McFarling, Director of Special Education, wrote to the Schuldts informing them that the school district would not modify Roosevelt to make it accessible to Erika. The letter stated:

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[2] Roosevelt is built on a sloping plot, and consists of a main building and two one-story wing additions. One wing contains the kindergarten classrooms, has ground level access, and is six steps higher than the ground floor of the main building. The second wing houses the cafeteria/gymnasium. It also has ground access, but is eleven steps lower than the ground floor of the main building. The principal's office, the nurse's office and the computer room are all on the ground floor of the main building, and the library is on the second floor of the main building.

> District 77 is not required to make each of its elementary school buildings accessible for handicapped students if it has an accessible site which offers the same programs that are available at the inaccessible building site.
>
> . . . [W]e are recommending that Erica [sic] attend one of the three totally accessible elementary buildings that we have available in District 77. Washington, Kennedy and Hoover elementary schools are all totally accessible buildings and would meet Erica's [sic] needs appropriately.

Unhappy with the school district's response, Erika's parents requested and attended a conference[3] to further discuss where Erika would attend elementary school. After this meeting, McFarling sent the Schuldts a memorandum explaining that although Roosevelt could be modified to give Erika physical access to the building, the district refused to

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[3] Although the Schuldts labelled this meeting a "conciliatory conference," the Commissioner found that it was not a conciliation conference as defined in Minn. Rule 3525.3700 because at the time of the meeting Erika's individual education program for the coming year had not yet been completed. Schuldt, slip op. at 3.

place her at Roosevelt because even after modification, placement at Roosevelt would still be inferior to placement at one of the school district's three fully handicapped accessible schools.

Erika's parents requested a due process hearing to challenge the location of Erika's placement. See 20 U.S.C. § 1415(b)(2) (1988). In the interim, they agreed to permit Erika to attend Kennedy Elementary School, "a fully accessible school located approximately four miles from [their] home." *Schuldt*, slip op. at 4. Despite repeated efforts, the Schuldts were unable to persuade the school district to place Erika at Roosevelt.

On May 1, 1989, after a due process hearing, an administrative law judge ruled that the school district had failed to comply with the applicable procedural requirements of state and federal law, that Erika's individualized education program did not provide her with the free appropriate public

education to which she was entitled, and that placement at a school other than Roosevelt did not constitute placement in the least restrictive environment as required under the Education for the Handicapped Act. Due Process Hearing for Erika Schuldt, No. 56-2103-2950-3, slip op. at 22-23 (¶¶ 19,21, and 22) (May 1, 1989).

The school district appealed this decision to the Commissioner of Education, who delegated her authority as hearing review officer to Deputy Commissioner of Education Robert J. Wedl.[4] On June 26, 1989, Deputy Commissioner Wedl issued a finding and final decision concluding that although the school district had failed to comply with state and federal procedural requirements, nonetheless, Erika's

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[4] The Schuldts challenged the impartiality of the Commissioner and other employees of the state's Department of Education and requested that the Commissioner appoint an independent person to act as hearing review officer, but the Commissioner denied the request. On appeal, the Schuldts do not challenge the Commissioner's appointment of Wedl.

program should remain unchanged because it provides her with a free, appropriate public education, in the least restrictive environment. *In Re Schuldt v. Independent School District No. 77*, Decision of Deputy Commissioner of Minnesota Department of Education, slip op. at 33-34 (June 26, 1989).

The Schuldts then brought this action in the district court, claiming that because of the procedural violations, the district court should order the school district to modify Roosevelt to accommodate Erika. The issue, according to the district court, was not whether the school district followed the procedural requirements, but whether what it actually did satisfied the requirements of the Education for the Handicapped Act.[5] *Id.* at 13. The district court refused to

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[5] As the district court stated:

> [t]he Congressional mandate to afford each handicapped child free appropriate public education is satisfied if the state provides personalized instruction, with sufficient

order the school district to modify Roosevelt because it concluded that the district was providing Erika a free appropriate education in the least restrictive environment, and was thereby complying with the ultimate objective of the Act. *Id.* at 9-14.

The Schuldts argued before the district court that the school district's failure to follow state and federal procedures, by itself, denied Erika a free appropriate public education. They asked the district court to direct the school district to place Erika at Roosevelt. The district court acknowledged that the school district violated some state and federal procedures, but declined to consider the impact those procedural

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> support services to permit the child to benefit educationally from the instruction. *Rowley*, 458 U.S. at 203. This instruction must be provided at the public expense, must meet the state's educational standards, must meet the approximate grade levels used in the state's regular education system, and must comport with the child's IEP.

Slip op. at 9-10.

violations had on Erika because the Schuldts had "waived their possible right to a remand" during oral argument before the district court. Slip op. at 9.

On appeal, the Schuldts claim that the district court erred by refusing to grant the requested remedy, and by suggesting that the only remedy for the procedural failures would have been to remand for further proceedings. See Slip op. at 14. They argue that the court's statement improperly requires "re-exhaustion" of administrative proceedings. We need not tarry long over this argument.

The district court concluded that Erika's placement location would not have changed, even if the school district had followed the correct procedures. Slip op. at 14. Furthermore, the failure of the school district to comply with procedural requirements, of necessity, would require remand for further consideration. Yet, as the district court observed, the Schuldts waived their right to a remand to correct the

procedural defects.

The district court properly reasoned that "[w]ithout remanding for the development of a new [individualized education program], an order directing Erika's placement at Roosevelt would violate *Rowley's* admonition against a court imposing its views of preferable educational methods upon the state." Id. (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982)).

II.

The Schuldts make numerous arguments that the Education for the Handicapped Act requires the school district to modify Roosevelt and make it fully accessible to Erika.

A.

The Schuldts argue that the act requires the school district to place Erika at the school nearest to her home. Their argument misinterprets the act, misuses precedent, and

essentially ignores the district court's determination that the school district fully complied with the Act by placing Erika at Kennedy.

The act and regulations promulgated thereunder give the school district discretion in selecting the location where it will educate a handicapped child. Specifically, 34 C.F.R. § 300.552 (1990) provides factors a school district should take into consideration when making its decision about the location of a student's education. The regulation instructs the school district to choose a location based on the student's individualized education program, to choose a location that is as close as possible to the child's home, and unless the child's program requires something else, to choose the location where the child would attend school if he or she were not handicapped. *Id.*

We interpret section 300.552 as directing the school district to locate Erika at a school where her teachers can

fully implement her program. The phrase "as close as possible" is not a mandate that the school district place Erika at Roosevelt. As we pointed out earlier, the district court concluded that even if the school district had followed the proper procedures, Erika's individualized education program team would not have chosen Roosevelt as the location of her placement, slip op. at 14, and the record contains ample evidence to support this conclusion.[6]

The Schuldts' argument is aimed at forcing the school district to assign Erika to Roosevelt. They contend that Roosevelt is the ideal location for Erika because it would

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[6] The school district presented evidence that even if it installed ramps to give Erika physical access, Roosevelt would still inadequate because the first floor classrooms are crowded and Erika would not be able to move through them in her wheelchair, Erika would not be able to reach the library, there is insufficient space in which to store Erika's supplemental equipment, and there is not a private room where Erika can receive her daily physical therapy or catheterization when needed. None of these limitations exist at Kennedy.

allow her to attend school with her younger siblings, and with other children in her neighborhood. Even assuming that Roosevelt would be the optimum environment for Erika, the Education for the Handicapped Act does not require the school district to provide services which "maximize the potential of each handicapped child commensurate with the opportunity provided other children." *Rowley*, 458 U.S. at 200. By bussing Erika to one of several nearby schools, the school district is already providing Erika with a fully integrated public education, thereby meeting its obligation under the act.

B.

The Schuldts also argue that the district court erred because it considered cost to the school district when evaluating the propriety of the school district's decision not to modify Roosevelt. Lyle McFarling testified, on behalf of the school district, that cost was not a factor in his decision

to assign Erika to a school other than Roosevelt. The Schuldts argue that this testimony, coupled with the fact that the school district did not submit any evidence of how cost would affect the school district's ability to provide services to other children, should have prevented the district court from considering cost when reaching its decision.[7]

The record does not suggest that the court relied heavily on cost-benefit analysis for its ultimate decision. The court's brief reference to the balancing of costs and benefits only appears once, and that reference is in the court's discussion of whether the Education for the Handicapped Act creates an absolute duty to place a child in the school nearest to that child's home. Slip op. at 12. The court was explaining

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[7] The Schuldts also argue that the cost of modifying Roosevelt is *de minimis* ($500-$3,000). The minimal modifications covered by this figure would only allow Erika physical access to the first floor and kindergarten wing of the school. Appellants concede that making the entire building accessible would require an elevator, and would cost approximately $160,000.

that distance from a child's home is not the determining factor, but only one of several factors a school district must consider when deciding whether a child's placement complies with the act and its regulations. *Id.*

The district court opinion cited this court's opinion in *A.W. v. Northwest R-1 School District*, 813 F.2d 158 (8th Cir. 1987), in which we stated that a court may "consider both cost to the local school district and benefit to the child," *Id.* at 163, when evaluating the school district's placement decision. Slip op. at 12. The district court was entitled to rely on *A.W.* as a matter of law. Lyle McFarling's testimony that cost was not a consideration did not prevent the district court from recognizing that the cost of modifying Roosevelt would have implications on the school district's ability to provide other services. See *A W.*, 813 F.2d at 163.

The Schuldts take statements from McFarling's testimony out of context and place a strained interpretation on

them. The import of McFarling's testimony was that even if the school district spent $500-$3,000 installing ramps and changing door handles, the Roosevelt building would still not meet Erika's educational needs.[8]

While it is true that the school district did not introduce extensive evidence of the impact the costs of structural modifications would have on the overall budget, the Schuldts themselves introduced substantial testimony on that issue. Moreover, the district court did not need such specific evidence to know that the total funds available to the school district are limited, and it is axiomatic that funds spent modifying Roosevelt must, of necessity, mean a reduction of funds available for other education related needs.

The Schuldts also cite *New Mexico Association for Retarded Citizens v. New Mexico*, 678 F.2d 847, 855 (10th Cir. 1982), for the proposition that "[s]chool districts are

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[8] See Supra note 7 & accompanying text.

required to modify existing programs where the 'financial burden would not be excessive' and the modifications would benefit the child." Brief for Appellants at 24, *Schuldt v. Mankato Indep. School Dist. No. 77*, (No. 90-5146MN). They claim that "[t]he test for excessiveness is whether the modifications would 'jeopardize the overall viability of the educational system."' *Id.* (citation omitted).

New Mexico can be distinguished from the present case on its facts, and because the case was decided under a different federal statute. In *New Mexico*, the plaintiff class claimed that the structure of the district's entire special education service system discriminated against its members in violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988) (commonly known as "Section 504"). The class argued that its members were not receiving adequate educational benefit from the school district because the district was not adequately accommodating handicapped

students. See *New Mexico*, 678 F.2d at 855. The Schuldts' primary claim is a violation of the Education for the Handicapped Act, and unlike appellants in *New Mexico*, the Schuldts have never suggested that the education Erika receives at Kennedy is inadequate, or that it does not properly integrate her with non-handicapped students. Their only complaint is that they want Erika to receive the same educational benefits she is presently receiving at Kennedy, at the school four blocks from their home.

The underlying premise of the Schuldts' claim, which we reject, is that Roosevelt is the only school to which the school district can assign Erika and still be in compliance with the law. *New Mexico* does not go so far. The *New Mexico* court stated: "[M]odification of existing programs may be required where the financial burden would not be excessive and the accommodation would enable handicapped children to realize the benefits of the State's educational

program." *New Mexico*, 678 F.2d at 855 (emphasis added). Even if *New Mexico* were on point, this language does not mandate that school districts must structurally modify all of their school buildings to accommodate physically handicapped children when those children are already receiving an appropriate public education. The Schuldts' argument on this issue is without merit.

III.

Interspersed through the Schuldts' briefs are suggestions that the school district discriminated against Erika on the basis of her handicap in violation of the Rehabilitation Act, 29 U.S.C. 5 794(a),[9] by refusing to make Roosevelt accessible to her. This argument is also advanced by

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[9] The Rehabilitation Act as modified in 1988 states: "No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a) (1988).

amici curiae The Spina Bifida Association of America, Advocacy Incorporated, Schools are for Everyone, and the Association for Persons with Severe Handicaps.

The Schuldts raise their Section 504 claims for the first time on appeal. Not only did they fail to make a discrimination argument to the district court, but they filed, with the district court, a memorandum in support of their motion for judgment on the pleadings in which they intimated that the school district complied with Section 504.1.[10] We

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[10] The memorandum stated:

> [A]ll buildings and facilities do not need to be made accessible to comply with the Rehabilitation Act, if the program as a whole is accessible. See 34 C.F.R. 5 104.22, 34 C.F.R. Part 104, App. A, Subp. C. Indeed, the Office of Civil Rights has essentially told inquiring school districts that they are not in violation of the Rehabilitation Act if all of their schools are not accessible as long as all educational programs are accessible. . . .
>
> . . . [A]lthough the fact that Erika can attend another public elementary school may satisfy the general antidiscriminatory provisions of §

do not address this issue on the merits because we do not consider arguments that are raised for the first time on appeal. See, e.g., *Lourdes High School v. Sheffield Brick & Tile Co.*, 870 F.2d 443, 446 (8th Cir. 1989) (refusing to consider equal protection challenge not raised below); *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 724 (8th Cir. 1976) ("It is old and well settled law that issues not raised in the trial court cannot be considered by this court as a basis for reversal.").

---

504 of the Rehabilitation Act, it is irrelevant to the inquiry of whether the District has met its affirmative obligation to place Erika in her neighborhood school under the least restrictive environment provisions of the EHA.

Appellee's Response to Brief of Amici Curiae, Addendum Exhibit A at 14, 16, *Schuldt v. Mankato Indep. School Dist., No. 77* (No. 90-5146MN).

IV.

For the foregoing reasons, we affirm the decision of the district court.

A true copy.

Attest:

/S/
CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Appendix B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

August 20, 1991

No. 90-5146MN

Mary Schuldt, et al.,	*	
	*	
Appellants,	*	
	*	Appeal from the United
vs.	*	States District Court for
	*	the District of Minnesota
Mankato Independent School	*	
District No. 77,	*	
	*	
Appellee.	*	

Appellant's petition for rehearing has been considered by the court and is denied.

August 20, 1991

Order Entered at the Direction of the Court:

/S/
Clerk, U.S. Court of Appeals, Eighth Circuit.

Appendix C

Stipulation to Dismiss
Appellee Thomas Nelson

May 10, 1990

United States Court of Appeals
For the Eighth Circuit

8th Cir. No. 90-5146MN

Mary Schuldt and Douglas Schuldt, on behalf of themselves and their minor daughter, Erika Schuldt,

Appellants,

v.

Mankato Independent School District No. 77; and Thomas Nelson, in his capacity as Commissioner of the Minnesota Department of Education (successor to Ruth Randall),

Appellees.

STIPULATION TO DISMISS APPELLEE THOMAS NELSON

TO: THE ABOVE-NAMED COURT; CHARLES MOTTL/BERNARD JOHNSON, OFFICE OF THE MINNESOTA ATTORNEY GENERAL, COUNSEL TO THOMAS NELSON, IN HIS CAPACITY AS COMMISSIONER OF THE MINNESOTA DEPARTMENT OF EDUCATION; AND PAUL RATWIK/SUSAN TORGESON, COUNSEL FOR MANKATO INDEPENDENT SCHOOL DISTRICT NO. 77.

WILL YOU PLEASE TAKE NOTICE that pursuant to the attached Stipulation entered into between Appellants and Appellee Nelson, the Appellants hereby move to dismiss the appeal as against Appellee Thomas Nelson, Commissioner of the Minnesota Department of Education. The Appellants will proceed against Appellee Mankato Independent School District No. 77.

Dated: April 30, 1990

/S/
Sonja D. Kerr
Counsel for Appellants
Atty. Reg. No. 18777X
3421 Kent Street
Shoreview, MN 55126
(612) 483-6209

STIPULATION

Appellee Thomas Nelson, in his capacity as Commissioner of the Minnesota Department of Education, and Appellants, Mary and Douglas Schuldt, on behalf of themselves and their minor daughter, Erika Schuldt, hereby enter into the following Stipulation.

A. Appellee Thomas Nelson, in his capacity as the Commissioner of the minnesota Department of Education agrees as follows:

1. The Commissioner will support the concept of an accessibility study of all public school facilities located in the State of Minnesota, and will support legislative efforts to that end. Further, the Commissioner will ensure that any such facilities study/report completed will be reviewed by the SEEK Committee and be available to the public.

2. The Office of Monitoring and Compliance of the Department of Education will review the specific due process deficiencies outlined in the order of Deputy Commissioner Robert Wedl, dated June 26, 1989, to ensure that Mankato Independent School District No. 77 takes action to correct those deficiencies found by the Deputy Commissioner. It will be within the Department's discretion to determine what actions must be taken by the School District to correct the deficiencies.

Further, the Office of Monitoring and Compliance will forward to Appellants a copy of the monitoring plan and procedures to be used in this monitoring review. The Office will also forward to Appellants and make available to

the general public, copies of a written report expected to be completed as a result of this monitoring review. The Office will also promptly investigate any complaints raised against the District, consistent with the manner in which it investigates complaints against any other school district.

3. The Department agrees to support, in the 1991 Minnesota Legislative Session, a mediation component to be added to the present "two-tier" process contained in Minnesota Statutes section 120.17.

B. In return for the above commitments by the Commissioner and the Department of Education, the Appellants agree to:

1. Dismiss Appellee Thomas Nelson in his capacity as Commissioner of the Minnesota Department of Education from this appeal.

2. Stipulate that Issue No. 4, whether the district court erred, as a matter of law, in concluding that Minnesota's "two-tier system" of review of special education matters provides the impartial state-level hearing review required by federal law (10 U.S.C. § 1415), as contained in appellants' Form A "Appeal Information Form" is dismissed and will not be considered as an issue in this appeal.

3. Will not request any costs or attorneys' fees in this matter from Appellee Nelson in his capacity as Commissioner of the Minnesota Department of Education.

Further, the Appellants and Appellee Nelson include in this Stipulation, the attached correspondence between the parties, dated April 5, 1990; April 19, 1990, and April 23, 1990.

Dated: April 30, 1990

/S/
Sonja D. Kerr
Counsel for Appellants
Atty. Reg. No. 18777X
3421 Kent Street
Shoreview, MN 55126
PH: (612) 483-6209

Dated: May 4, 1990

/S/
Bernard Johnson
Special Asst. Atty. Gen.
Counsel for Appellee Nelson
Atty. Reg. No. 50532
1100 Bremer Tower
7th Place & Minn. St.
St. Paul, MN 55101
PH: (612) 296-1801

Dated: May 4, 1990

/S/
Charles T. Mottl
Attorney General's Office
Counsel for Appellee Nelson
Atty. Reg. No. 75814
1100 Bremer Tower
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St. Paul, MN 55101
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Appendix D

Memorandum Opinion of the U.S. District Court for the District of Minnesota Fourth Division

February 23, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Mary Schuldt and Donald Schuldt, on behalf of themselves and their minor daughter, Erika Schuldt,

Plaintiffs,

Civ. No. 4-89-636

Mankato Independent School District-No. 77; and Ruth Randall, in her capacity as Commissioner of the Minnesota Department of Education,

MEMORANDUM OPINION AND ORDER

Defendants.

Kristin A. Siegesmund, Esq., and Laurie N. Davison, Esq., Mid-Minnesota Legal Assistance, Inc., 222 Grain Exchange Building, 323 Fourth Avenue South, Minneapolis, Minnesota 55415, appeared for plaintiffs.

Paul C. Ratwik, Esq., and Susan E. Torgeson, Esq., Ratwik, Roszak, Bergstrom, Maloney & Bartel, P.A., Suite 1302, One Appletree Square, 8009 South 34th Avenue, Minneapolis, Minnesota 55425 appeared for defendant, Mankato School District No. 77.

Laura E. Mattson, Esq., Special Assistant Attorney General, 1100 Bremer Tower, 7th Place & Minnesota Street, Saint Paul, Minnesota 55101, appeared for defendant Ruth Randall, Commissioner to the Minnesota Department of Education.

Plaintiffs Mary and Donald Schuldt (Parents), on behalf of themselves and their minor daughter Erika Schuldt, brought this action against defendants Mankato Independent School District No. 77 (District), and Ruth Randall, in her capacity as Commissioner of the Minnesota Department of Education (Commissioner), alleging violations of the Education of the All Handicapped Children Act (the Act), 20 U.S.C. § 1400-85, Minn. Stat. § 120.17, and violations of 42 U.S.C. § 1983. Plaintiffs seek declaratory judgments,

injunctive relief and attorney's fees under both the Act and 42 U.S.C. § 1988. Subject-matter jurisdiction is alleged under 20 U.S.C. § 1415(e)(4)(A), 28 U.S.C. § 1331, and 28 U.S.C. § 1343(3) and pendent jurisdiction. Although not pleaded, venue is proper under 28 U.S.C. § 1391. Now before the court is plaintiffs' motion for judgment on the record.[1]

Erika Schuldt is a seven-year old girl who was born with spina bifida that resulted in paralyzation from the waist down. Erika must use a wheel chair for mobility, but her paralysis does not affect her intellectual capacity. Erika also requires regular physical therapy, catheterization, and bowel care. The lack of bladder and bowel control occasionally results in accidents that require clothing changes.

Erika first received special education instruction and services from the District during the 1986-87 school year.

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[1] The parties stipulated that no further discovery would be required and that the matter should be determined on the administrative record.

During the 1987-88 school year, Erika attended early childhood special education classes at Franklin Elementary School to facilitate her transition into regular kindergarten. In the spring of 1988, the parents notified the District that they wanted Erika to attend kindergarten at Roosevelt Elementary School which was approximately five blocks from their home. Erika would normally have attended Roosevelt in accordance with the District's attendance policy, but Roosevelt is not fully handicap accessible.

On June 16, 1988, the District Director of Special Education, Lyle McFarling, sent the parents a letter stating that the District was not obligated to make each facility handicap accessible if the District had an accessible site which offered the same special education programs. McFarling's letter was based on the opinion of the District's attorney. McFarling recommended that Erika attend one of

three handicap accessible elementary schools within the District.[2]

On August 10, 1988, the parents requested a conciliation conference to resolve the issue of Erika's school placement for the 1988-89 school year. The parents, McFarling, and the Director of Elementary Education, Robert Nelson, met on August 19, 1988. Although the parties label this meeting a conciliation conference, the Commissioner found that since the individualized education program (IEP) was not completed, it could not constitute a conciliation conference under the Act.

McFarling sent a memorandum of the meeting to the parents acknowledging that "the educational program that Erika needs is available at each elementary school in [the District]" and that "Roosevelt could be modified to permit

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[2] The three schools recommended by McFarling were Washington, Kennedy and Hoover Elementary Schools.

full accessibility", but refusing to place Erika at Roosevelt. McFarling also informed the parents that the District intended to place Erika at Washington Elementary School during the 1988-89 school year. McFarling explained the reasons behind the District's decision concluding that even if Roosevelt were made accessible with ramps or elevators, it would still be inferior to another placement.[3]

On September 7, 1989, the parents requested that the District schedule a due process hearing for the purpose of challenging the District's placement of Erika. The parents agreed that during the review process Erika would attend Kennedy, a fully accessible school located approximately four miles from plaintiffs' home.

---

[3] According to the district, McFarling consulted with the district's architect, Roger Skaar after the initial meeting with the parents regarding the possible modification of Roosevelt to make the school fully accessible. Skaar prepared a report, dated August 29, 1988, addressing the measures needed to make Roosevelt fully accessible, but not specifically considering Erika's individual needs.

On October 25, 1988, Erika's "team" met to discuss the development of her IEP for the 1988-89 school year.[4] The parents contend that there was no discussion at the meeting concerning the placement of Erika or the possible modifications to Roosevelt.

Instead, the placement section of the IEP was drafted by McFarling and presented much of the same information and reasoning contained in the September 1, 1989 memorandum. There is no dispute as to the contents of Erika's IEP or the goals and objectives currently in place other than placement.

On February 2, 1989, a staffing was held to review Erika's IEP in light of a new independent accessibility assessment completed at the request of the parents and the

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[4] The "team" consists of a qualified representative of the local educational agency (LEA), the child's teacher, the child's parents or guardian, and where appropriate, the child. 20 U.S.C. § 1401(19). The team's purpose is to discuss and prepare an IEP. *Board of Educ. v. Rowley*, 458 U.S. 176, 181-82 (1982); See 20 U.S.C. § 1401(19)(outlining requirements for IEP); see also section 1414(a)(5).

District by Julee QuarvePeterson. The meeting was attended by all of Erika's current team members and a lengthy discussion about Erika's placement ensued. No new decision was reached. McFarling sent another memorandum to the parents which summarized the meeting, but did not indicate any change in the District's position on Erika's current placement at Kennedy.

The due process hearing was held between February 27, 1989 and March 2, 1989 before Administrative Law Judge Susan R. Weisman (ALJ). On May 1, 1989, the ALJ issued her decision which determined that:

1. The District had failed to comply with the applicable procedural requirements of state and federal law;

2. The individual education program did not provide Erika with a free appropriate public education; and

3. The proposed program and placement at a school other that Roosevelt did not

constitute the least restrictive environment.

On May 18, 1989, the District appealed the decision of the ALJ to the Commissioner. Pursuant to Minn. Stat. § 15.06 subd. 6, the commissioner delegated her authority as hearing review officer to Deputy Commissioner of Education Robert Wedl.

On May 19, 1989, plaintiffs challenged the impartiality of the Commissioner and other employees of the Minnesota State Department of Education to review the decision of the ALJ in a letter to the Minnesota State Board of Education (Board). Plaintiffs requested that the Board appoint an independent person to act as hearing review officer. On June 13, 1989, the Board denied plaintiffs' request.

On June 26, 1989, the Deputy Commissioner issued his findings and decision which concluded in part that:

1. the District failed to comply with the applicable procedural requirements of

state and federal law in proposing Erika's IEP and placement;

2. Erika's placement at Kennedy did not deny her access to specialized instruction and related services which are individually designed to provide educational benefit;

3. The placement at Kennedy did not deny Erika's right to placement at the least restrictive environment;

4. The District is not required to provide structural modifications to Roosevelt which would otherwise be necessary to make the school accessible to Erika because of the existence of another accessible school in the District in close proximity to Erika's home; and

5. The [ALJ's] decision [was] in error because it required modification to [Roosevelt], and failed to give proper consideration to reasonable and available alternative school sites which are already accessible.

On July 24, 1989, plaintiffs commenced this action challenging

the decision of the Deputy Commissioner.

II.

Both federal and state law provide for an administrative complaint process to contest educational decisions. Once exhausted, 20 U.S.C. § 1415 provides recourse to aggrieved parties:

> (2) Any party aggrieved by the findings and decision made . . . shall have the right to bring a civil action with respect to the complaint . . . in a district court of the United States without regard to the amount in controversy.

20 U.S.C. § 1415(e)(2).

The action may concern "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1)(E).

Section 1415(e)(2) further provides that in reviewing the complaint:

> [T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and,

> basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Under section 1415, the court is to make "independent decision[s] based on a preponderance of the evidence." *Board of Educ. v. Rowley*, 458 U.S. 176, 205 (1982). This standard is not an "invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review", but carries with it the implied requirement that "due weight" be given to these proceedings. *Id.*[5]

Rowley also established a two-step inquiry for civil actions under the Act. The court should first determine whether the state has complied with the appropriate proce-

---

[5] The parties dispute whether the court's review includes the question of Roosevelt as a more appropriate location. If the court were to find that the district violated the law, it might then consider the appropriate relief to implement the statutory purposes of the Act. See *School Comm. v. Department of Educ.*, 471 U.S. 359 (1985).

dures and then whether the IEP developed through the Act's procedures is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-07.

III.

A.

The Act requires states to provide handicapped children with a "free appropriate education" as a condition to receiving federal financial assistance. *Evans v. Dist. No. 17*, 841 F.2d 824, 826 (8th Cir. 1988). To attain this objective, the Act establishes a system of "procedural safeguards" which permits parents to participate in, disagree with, and contest decisions made by public schools concerning their child's education. *Id.* The Supreme Court has stressed that "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against

a substantive standard." *Rowley*, at 205-06. Plaintiffs assert that the District violated the procedural requirements of the Act, Minn. Stat. § 120.17, and the accompanying regulations. Both the ALJ and the commissioner found that the District failed to follow several of these procedures.[6]

The Commissioner concedes that the District violated the certain procedural requirements, but the District attempts to minimize its admitted failings by claiming that the plaintiffs received enough process to satisfy due process and that any procedural errors were harmless.

Although some courts have found procedural violations sufficient to show the absence of a free appropriate public education, it is unnecessary to reach this issue.[7] At

---

[6] It is not necessary to repeat here the specific procedural violations which are adequately discussed in the decisions of both the ALJ and the Commissioner.

[7] Several courts have found that procedural violations amounted to a failure to provide a free appropriate public education as mandated by the Act. *Jackson v. Franklin County School Bd.*, 806 F.2d 623, 629 (5th

oral argument, plaintiffs waived their possible right to a remand based on the District's failure to follow the Act's procedural safeguards. See *N.W. ex rel. A.W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 161 (8th Cir.), cert. denied, 484 U.S. 847 (1987); cf., *Jackson v. Franklin County School Bd.*, 806 F.2d 623, 630 (5th Cir. 1986).

B.

The key issue is whether Erika's placement in Kennedy constitutes "free appropriate public education" in the "least restrictive environment" available.

The Congressional mandate to afford each handicapped child free appropriate public education is satisfied if the state provides personalized instruction, with sufficient support services to permit the child to benefit educationally

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Cir. 1986); *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985); but see *Evans v. Dist. No. 17*, 841 F.2d 824 (8th Cir. 1988) (suggesting that some prejudice must be shown from procedural errors).

from the instruction. *Rowley*, 458 U.S. at 203. This instruction must be provided at the public expense, must meet the state's educational standards, must meet the approximate grade levels used in the state's regular education system, and must comport with the child's IEP. *Id.*

Plaintiffs do not contest the quality of the actual education and support services that Erika receives, but argue that the placement of Erika at Kennedy rather than Roosevelt violates the least restrictive environment requirements of the Act. Defendants maintain that the District has complied with federal and state law by placing Erika in a school close to her home that provides her with a free appropriate public education.

The least restrictive environment standard arises from 20 U.S.C. § 1412(5)(B) which requires states to adopt:

> [P]rocedures to assure that, to the maximum extent appropriate, handicapped children, . . . are educated with children who are not handicapped, and that special classes, separate

> schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, ...

This requirement is known as "mainstreaming." *Mark A. v. Grant Wood Area Educ. Agency*, 795 F.2d 52, 54 (8th Cir. 1986), cert. denied, 480 U.S. 936 (1987). 34 C.F.R. § 300.550-56 supplements the mainstreaming requirements of the Act under the title, "Least Restrictive Environment". Section 300.552 provides:

> Each public agency shall insure that:
>
> (a) Each handicapped child's educational placement;
>
> (1) Is determined at least annually,
>
> (2) Is based on his or her individualized education program, and
>
> (3) Is as close as possible to the child's home;

> (c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped;
>
> (d) In selecting the least restrictive environment, consideration should be given to any potential harmful effect on the child or on the quality of services which he or she needs.

See also, Minn. Stat. 120.17; Minn. Rules 3525.0400.

Plaintiffs argue that the Act and its regulations impose mandatory standards on the District, and that the District failed to prove Erika's IEP required a placement at Kennedy rather than Roosevelt. See *Springdale School Dist. No. 50 v. Grace*, 656 F.2d 300, 305 n. 8 (8th Cir. 1981), vacated, 458 U.S. 1118 (1982).

The District contends that Roosevelt is inadequate to handle Erika's individual needs. The District also argues that plaintiffs' interpretation of the law could require each school in a local attendance zone to provide every

special education program needed by a handicapped child in the zone. Defendants claim that the Act's requirements must be viewed under a reasonableness standard, rather than as mandatory.[8]

The Act and section 300.552 do not create an absolute duty to place a child in the school closest to her home. Rather, these provisions list factors the school district should consider and require only that a student be placed in the school closest to her home that can meet her individual needs. *DeBlaay ex rel. DeVries v. Fairfax County School Bd.*, 882 F.2d 876 (4th Cir. 1989); *Barnett v. Fairfax County School Bd.*, 721 F. Supp. 757, 761 (E.D. Va. 1989); 34 C.F.R. § 300.552, Official Comment 2 ("Section 300.552

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[8] The Commissioner adds that section 504 of the Rehabilitation Act of 1973 (the Rehabilitation Act) and the corresponding regulations do not require each facility to be handicap accessible. See 34 C.F.R. § 104.22(a)(program does not require recipient [of federal funds] to make each facility or every part of a facility accessible to and usable by the handicapped).

includes some of the main factors which must be considered . . . ."); compare *Hendricks v. Gilhool*, 709 F. Supp. 1362, 1369-70 & n. 7 (E.D. Pa. 1989). A student's desire to attend another school is not dispositive. *DeVries*, 882 F. 2d at 878; *Barnett*, 721 F. Supp. at 761.

Relevant considerations also include both the cost to the school district and the benefit to the child. *A.W.*, 813 F.2d at 163-64; *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), cert. denied, 464 U.S. 864 (1983). This test is consistent with the Act which qualifies the mainstreaming requirement by stating that it should be implemented to the "maximum extent appropriate". 20 U.S.C. § 1412(5), and *Rowley's* acknowledgment that financial resources must be equitably distributed among all handi-

capped children. *Rowley*, 458 U.S. 176, 193 n. 15; see also *A.W.*, 813 F.2d at 163-64 (collecting cases).[9]

The question in this case is not what the District could have done, but whether what it did satisfies the Act's requirements. Plaintiffs argue that if the District had followed the procedural requirements of the Act, Erika would have been placed at Roosevelt. They want this court to direct the District to place Erika at Roosevelt without any further proceedings.

Defendants respond that the decision regarding Erika would have been the same even without the procedural errors because Erika's needs could not be met at Roosevelt without substantial structural modifications. The District also renews its argument that the procedural errors were harmless.

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[9] *Rowley* appeared to assume compliance with the Act's mainstreaming provisions. *N.W. ex rel. A.W. v. Northwest School Dist.*, 813 F.2d 158, 163 & n. 7 (8th Cir. 1987); Roncker, 700 F.2d at 1062-63; see also *Daniel R. R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989).

Although the District's actions violated the Act's mandate to assure "procedural safeguards," the District is providing Erika with a free appropriate public education. Erika is being educated with non-handicapped students for most of the school day at a school close to her home. She is apparently making satisfactory educational progress. Transporting students to a nearby school in lieu of renovating Roosevelt is analogous to centralizing a costly special education program at one location. See *Barnett*, 721 F. Supp. at 761.

Directing the District to place Erika at Roosevelt would be inappropriate under these circumstances. Although the parents contend that she would have been placed there if the procedural violations had not occurred, their argument is not supported by the record. There is significant evidence that the District's decision would have been the same. More importantly, the parents did participate in many discussions

regarding Erika's placement and have waived their right to a remand based on the procedural violations. Without remanding for the development of a new IEP, an order directing Erika's placement at Roosevelt would violate *Rowley's* admonition against a court imposing its views of preferable educational methods upon the state. *Rowley*, 458 U.S. at 207. For these reasons, the Commissioner's decision should be affirmed.

C.

Finally, plaintiffs claim they were denied an impartial state level review. Plaintiffs argue the Commissioner, as the head of the Minnesota Department of Education, or her delegate, can never be impartial under the review standards set forth by the Act and its regulations.

Section 1415(c) controls the state-level review process:

> If the hearing required in paragraph (2) of subsection (b) of this section is conducted by

> a local educational agency . . . any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. . . . [and] make an independent decision. . . .

The implementing regulations provide:

> (b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:
>
> (1) Examine the entire hearing record;
>
> (2) Insure that the procedures at the hearing were consistent with the requirements of due process;
>
> . . .
>
> (5) Make an independent decision on completion of the review;

34 C.F.R. § 300.510[10]

Plaintiffs cite several court decisions holding that a state education agency employee cannot serve as the hearing review officer. See, e.g., *Burr ex rel. Burr v. Ambach*, 863 F.2d 1071 (2nd Cir. 1988), vacated, *Sobol v. Burr*, 109 S.Ct. 3209 (1989); *Muth v. Central Bucks School Dist.*, 839 F.2d 113 (3rd Cir. 1988), rev'd on other grounds sub. nom., *Dellmuth v. Nuth*, 109 S.Ct. 2397 (1989); *Grymes v. Madden*, 672 F.2d 321 (3rd Cir. 1982); *Helms v. McDaniel*, 657 F.2d 800 (8th Cir. 1981), cert denied, 455 U.S. 946 (1982).

The defendants respond that these cases are distinguishable because the factual settings or the state administrative schemes were different. Defendants also point to several cases that reach opposite results. *Victoria L. ex rel. Carol A.*

---

[10] Comment 1 to 34 C.F.R. § 300.510 states:

> The State education agency may conduct its review either directly or t
> another state agency acting on its behalf.

v. Dist. School Bd., 741 F.2d 369 (11th Cir. 1984); *Brandon E. v. Wisconsin Dep't. of Pub. Instruction*, 595 F.Supp. 740 (E.D. Wisc. 1984).

It is settled that an employee of the state educational agency can not preside over the initial due process hearing under the Act because of the express statutory prohibition. *Robert M. v. Benton*, 634 F.2d 1139 (8th Cir. 1980): 20 U.S.C. § 1415 (b)(2).[11] The Act, however, does not

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[11] 20 U.S.C. § 1415(b)(2) governs the due process hearing:

> (2) Whenever a complaint has been received . . . the parents or guardian shall have an opportunity for an impartial due process hearing . . . as determined by State law . . . . No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education of the child.

The federal regulations that pertain to the due process hearing provide:

expressly prohibit employees of the state educational agency from conducting impartial reviews of due process hearing decisions.

Several courts have held that these employees may not be appointed to conduct impartial reviews because of the mandate that they be "impartial", the objectives of the review process, the legislative history of the Act, and the similarity of the duties between hearing officers and reviewing officers.

> (a) A hearing may not be conducted:
>
> (1) By a person who is an employee of a public agency which is involved in the education or care of the child, or
>
> (2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

34 C.F.R. § 300.507.

See *Holmes ex rel. Holmes v. Sobol*, 690 F. Supp. 154, 161 (W.D.N.Y. 1988)(collecting cases).

In 1984, the United States Department of Education, Office of Special Education Programs (the Department), notified state education agencies that procedural changes must be made to ensure impartiality in the reviewing officers. See Revised Bulletin No. 107. This mandate issued after the Department reviewed the developing body of adverse court decisions. To remain eligible for federal grants under the Act, states were given the choice to exclude agency employees from serving as review officers or to enact a written procedure ensuring procedural fairness and impartiality in the reviewing officer. Minnesota complied with Revised Bulletin No. 107 by enacting its current statutory scheme for an impartial review process.

Minnesota's process involves a two-tier system of review. The first tier is the local due process hearing which

is conducted in the school district where the child resides. See Minn. Stat. § 120.17 subd. 3b(d)(prohibiting employees, board members, or any public agency involved in the education of the child from being the hearing officer for due process hearing). The parties agree that the District conducted the initial due process hearing in accordance with the law.

At the second tier, Minnesota law provides that the Commissioner shall be the reviewing officer unless certain specified conflicts are present and gives all parties an opportunity to challenge the reviewing officer's impartiality or competence. The statute provides:

> (h) The commissioner, having delegated general supervision of special education to the appropriate staff, shall be the hearing review officer except for appeals in which:
>
> (1) the commissioner has a personal interest in or specific involvement with the student who is a party to the hearing;

(2) the commissioner has been employed as an administrator by the district that is a party to the hearing;

(3) the commissioner has been involved in the selection of the administrators of the district that is a party to the hearing;

(4) the commissioner has a personal, economic or professional interest in the outcome of the hearing other than the proper administration of the federal and state laws, rules, and policies;

(5) the appeal challenges a state or local policy which was developed with the substantial involvement of the commissioner; or

(6) the appeal challenges the actions of a department employee or official

For any appeal to which the above exceptions apply, the state board of education shall name an impartial and competent review officer.

In all appeals, the parent or guardian of the handicapped student or the district that is a

> party to the hearing may challenge the impartiality or competence of the proposed hearing review officer by applying to the state board of education.

Minn. Stat. § 120.17 subd 3b(h).

Plaintiffs make no argument that the Commissioner should be excluded as the hearing review officer under any specific provision of section 120.17 subd. 3b(h). Instead, they argue that the Act's legislative history and subsequent case law create an absolute bar to involvement by state educational agency employees in the hearing review process.

Defendants contend that Minnesota's amended statutory procedure overrides any presumption of partiality because the specific conflict provisions disqualify the Commissioner under any circumstances where she has an interest in the outcome. Moreover, defendants rely on the approval of Minnesota's review procedures by the Department. This approval came after the Department's review of the developing case law cited by plaintiffs.

Although the Act does not expressly prohibit state education agency employees from reviewing the due process hearing decision, the policy behind it would seem to prevent the review being conducted by any employee with direct or indirect involvement in the education of the child. Such policy may be inferred from the important procedural safeguards in the Act and the apparent congressional desire for impartiality found in the legislative history.

Minnesota's current review procedures adequately address each of these concerns. On the one hand, the Commissioner has delegated the general supervision of special education to her staff to avoid any direct conflict. On the other hand, section 120.17 subd. 3b(h), prevents the Commissioner's involvement if any indirect or potential conflict exists. Each party to a dispute can challenge the impartiality or competence of the reviewing officer prior to the state level review. The Department recommended and later approved

Minnesota's procedure with full knowledge of the Act, its purposes, the legislative history, and the court decisions which interpreted them. This interpretation should be given deference since the Department is the agency charged with monitoring and enforcing the Act. *Honiq v. Doe*, 484 U.S. 305, 325 n. 8 (1988). Plaintiffs' contention that the Commissioner or her delegate cannot conduct an impartial state-level review should be rejected.[12]

ORDER

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED

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[12] Plaintiffs also claim that the Commissioner did not review the entire record of the due process hearing as required by the Act. The Commissioner concedes that her delegate reviewed staff summaries of part of the record, but argues that such review satisfies established administrative procedure. *Morgan v. United States*, 304 U.S. 1, 17-18 (1938); see also, 3 K. Davis, *Administrative Law Treatise* § 17.3, p. 281 (2nd Ed. 1980).

that the decision of the Commissioner is affirmed and the case is dismissed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: February 23, 1990

/S/
Diana E. Murphy
United States District Judge

Appendix E

Findings of Fact, Conclusions and
Final Decision of the
Minnesota Commissioner of Education

June 26, 1989

STATE OF MINNESOTA	COMMISSIONER
DEPARTMENT OF EDUCATION	OF EDUCATION
IN THE MATTER OF	FINDINGS OF FACT,
ERIKA SCHULDT	CONCLUSIONS AND
VS	FINAL DECISION
INDEPENDENT SCHOOL DISTRICT NO. 77	
MANKATO, MINNESOTA	

The above matter came for a local hearing before Susan R. Weisman, a Hearing Officer appointed by the Commissioner of Education pursuant to Minnesota Statutes Sec. 120.17, Subd. 3b(d) (hereinafter referred to as "Minn. Stat."), and Rules of the State Board of Education Chapter 3525.4000 (hereinafter referred to as "Minn. Rule").

The hearing was held on February 27 through March 2, 1989 in Mankato, Minnesota. The parties waived the 45 calendar day requirement contained in Minn. Stat. Sec. 120.17 Subd. 3b(e). The record was closed on March 31, 1989.

Paul C. Ratwik, Attorney at Law, of the law firm Ratwik, Roszak, Maloney Bartel, Suite 1302, One Appletree Square, Minneapolis, Minnesota 55420, appeared on behalf of Independent School District No. 77, (hereinafter the "District," unless otherwise stated). Lawrence J. Ringer and

Son~a D. Kerr, Attorneys at Law, Legal Advocacy for Persons with Developmental Disabilities, 222 Grain Exchange Building, 323 Fourth Avenue South, Minneapolis, Minnesota 55415, appeared on behalf of Erika Schuldt and her parents, Doug and Mary Schuldt (hereinafter the "Parents").

On May 1, 1989, the Hearing Officer issued the local decision. On May 18, 1989, an appeal was received by the Commissioner of Education (hereinafter "Commissioner") requesting a review of the local decision and the entire record pursuant to Minn. Stat. Sec. 120.17, Subd. 3(f) and Minn. Rule 3525.4600. The entire record was received by the Commissioner and certified by the District as complete on May 24, 1989.

Both parties submitted briefs according to the following briefing schedule: Mr. Ratwik for the District was received

on June 6, 1989; Mr. Ringer for the parents was received on June 13, 1989; the Commissioner was to issue a decision on June 26, 1989. The statutory timelines were waived by all parties.

Based on the record, the following is the:

STATEMENT OF ISSUES

The issues in this case presented to the Commissioner are essentially as follows:

1. Whether District No. 77 has complied with the applicable procedural requirements of federal and state law in proposing Erika Schuldt's 1988-89 individualized education program (IEP)

and placement;

2. Whether the IEP proposed by District 77 for 1988-89 to be implemented at a school other than Roosevelt Elementary School sets forth a program of educational services which provide access to specialized instruction and related services which are individually designed to provide educational benefit; and

3. Whether the 1988-89 placement for Erika Schuldt at a school other than Roosevelt Elementary School constitutes a violation of her right to placement in the least restrictive environment.

Based upon all the files, records and proceedings herein, the Commissioner makes the following:

FINDINGS 0F FACT

1. Erika Schuldt, daughter of Mary and Douglas Schuldt, was born March 27, 1982. She and her family reside in Mankato Independent School District No. 77. Erika lives in the attendance area of Roosevelt Elementary School, which is her neighborhood school, or the

school located closest to her home (School District Exhibit #6, Transcript 432).

2. Erika has a form of spina bifida known as Myelomeningocele (Tr. 29). At birth a portion of her spinal cord protruded through her back exposing nerves and tissues. This required corrective surgery. As a result, Erika is permanently paralyzed from the waist down with no sensation below her waist. She has no use of her legs. She cannot voluntarily urinate or move her bowels (Tr. 906-907).

3. Erika has received special education services from the district since she was four years old (Tr. 756).

4. For the 1987-88 school year, Erika was placed in a transition program in the District to assist her in

moving from preschool to kindergarten (Parents Exhibit #1, Tr. 400-401).

5. The services set out in the October 14, 1987 IEP were provided at Franklin Elementary School. The parents approved the IEP and it was implemented by the District. That IEP states the following (P.E. #1).

* "Erika's needs can best be met through direct therapy and enrollment in an early childhood special education class."
* Level of Service is listed as "IV."
* "Education activities and involvement student will have in the regular classroom: (Consider least restrictive environment). Library books will be brought to the classroom for Erika to choose from each week."
* No regular education service provider is listed

as part of Erika's team.

* Erika will receive a total of 1085 minutes per week of special education and related services. (The total Early Childhood Special Education class time is two hours and thirty-eight minutes per day (TR 188), or a total of 790 minutes per week. The remaining 295 minutes is physical and occupational therapy time in addition to the classtime).

6. For 1988-89 the parents and the District agreed that Erika would be attending a regular kindergarten class (Tr. 804).

7. Erika has both occupational and physical therapy needs (S.D. E. #6, P.E. #1). She has difficulty in the area of motor planning or the ability to independently

sequence physical actions toward desired results (Tr. 31-33, 269). This difficulty requires service providers to give repeated directions each time a task is to be performed and provide a consistent learning environment (Tr. 43, 208, 269-270, 288). Kathleen Bauer, Erika's physical therapist, gave the following example:

> ...if there's a change like last week I was not to work with her initially so I had Marge who had not her for two years get her off the bus because I was going to be late and she needed to bring her all the way to the classroom and take her coat off. Because there was a new person, she did not know how to take her coat off because she learned how to take it off over her

head, and she learned how to take it off just through her arms. She did not remember what to do to get her coat off; and so when I got there 15 minutes later, she was still struggling ~ ow do I get my coat Off" (Tr. 43-44).

8. For physical therapy Erika uses a jet mobile, a wheel-o-whirl, two mats, a vestibular or rocker board, a two-foot wide piece of formica, a chair and a push-up bar (Tr. 66, 70-74, 85). This equipment needs to be stored when not in use.

9. For mobility Erika needs a wheelchair and an aide (S.D.E. ~5, Tr. 58). She is able to move with other children her age, keeping up with them in the classroom and in the hallway with the assistance of an

aide (S.D.E. #5, Tr. 309).

10. In the classroom Erika uses a wheelchair, a standing frame or parapodium, a walker, a booster or Rifkin chair, and a standing table (S.D.E. #6, Tr. 284-286, 74, 226-227). This equipment needs to be stored in a space approximately eight feet square (Tr. 286).

11. On February 19, 1988, a periodic review was held to assess Erika's progress as it related to the October 14, 1987 IEP. In attendance at that meeting were: Chris Wakefield, Erika's teacher; Mary Jane Hassel, occupational therapist; Sandy Hasse, adapted physical education teacher; Doug and Nary Schuldt, Erika's parents (Tr. 237, 245-247). Not present at that meeting were Erika's physical therapist (Tr. 125-126, 246), and an administrative designee who was not

Erika's teacher.

12. On May 19, 1988, Lyle McFarling, Director of Special Education, met with Doug and Mary Schuldt to discuss Erika's placement for the 1988-89 school year. None of Erika's teachers were present (Affidavit, Doug Schuldt).

13. On August 19, 1988, a conciliation conference was held to discuss the location of Erika's program for the 1988-89 school year (Affidavits of C.R. Nelson and Doug Schuldt, S.D.E. #6). The meeting was attended by Mr. Schuldt, Mr. McFarling, and Mr. Nelson. A memorandum dated September 1, 1988, and sent by Mr. McFarling, documents that conference and (S.D.E. #15) states, in part:

> 3. While it is agreed that Roosevelt

Elementary could be modified to permit full accessibility, the very existence of ramps, elevators and other physical modifications and adaptations tend to magnify the differences between children in wheelchairs and able bodied children.

4. While ramps and elevators can be used safely, it is always better from a safety's standpoint, to use a single floor building for children in wheelchairs.

5. In the long run, the single floor building is more conducive for transition to an electrical powered wheelchair if that becomes the direction for Erika.

14. Two written documents were sent from the District to the Schuldts prior to Erika's September 9, 1988 placement. These were a letter dated June 16, 1988, from Lyle McFarling (S.D.E. #13) and a memorandum from Lyle McFarling, dated September 1, 1988 (S.D.E. #15). The first document does not mention the enclosure of the notices to the parents required in Minn. Rule 3525.3600. The second documents the enclosure of a parent response form, parent rights and information regarding hearing procedures.

15. In August of 1988, the District contacted Roger Skaar, architect, to look at Roosevelt Elementary School to determine whether the kindergarten area was accessible, and to look at the entire building to determine what might have to be done to make it

accessible (Tr. 514).

16. On September 7, 1988, the parents requested a local due process hearing essentially challenging the District's proposal to provide special education services for Erika at an elementary school other than Roosevelt Elementary School for 1988-89. The parents want Erika to attend school with other children in her neighborhood. It is hrs. Schuldt's desire that Erika be able to traverse back and forth to school with the neighborhood children who walk to school (Tr. 920-922).

17. The team, including the parents, agreed to the special education program to be provided to Erika for 1988-89, except for the location at which would be provided (Tr. 920-922, S.D.E. #6).

18. While the local due process hearing was pending, the parents agreed that the IEP services could be provided by the District at Kennedy Elementary School (Tr. 803-804).

19. On October 25, 1988, the team met to develop Erika's IEP for the 1988-89 school year. That IEP states the following (S.D.E. #6):

* "Integration fulltime into kindergarten with support of the special education teaching assistant can best meet her kindergarten curriculum needs with support/consultation of the adaptive physical education teacher and kindergarten integration teacher.
* No level of service is listed.
* "Mrs. Turpin Kdg. Teacher" is listed as a team member.

* "Education activities and involvement student will have in the regular classroom: (Consider least restrictive environment). Erika is involved with all activities in kindergarten."

* "Erika will receive 145 minutes per week of special education services, and two consultations per month between the Adaptive Physical Education teacher and the aide."

20. Erika's needs, as outlined on her October 25, 1988 IEP (S.D.E. #6), are:

General Knowledge

Increase quantitive concepts

Increase directional and positional concepts

Math

Name ordinal position:

last, second

Boehm Concepts

Continue to increase concepts

Comprehension

Name who, what, why, where, when

Name things needed for an activity

Name parts of an item

Name source of actions

Continue answering questions about experiences in kndg.

Fine Motor

Use assisting hand on paper, pencil tasks

Draw a rectangle

Classroom Observation

Continue to increase her independence in the classroom No mobility, access or equipment needs are listed.

21. As part of the regular education kindergarten program in which Erika is integrated, Erika needs access to the

library, computer room, and gymnasium (Tr. 304-306, 308-309).

22. The services outlined in Erika's 1988-89 IEP, dated October 25, 1988, began on September 9, 1988 (Tr. 914).

23. Other than the location of services, the IEP prepared on October 25, 1988, was approved by the parents (Tr. 427).

24. In late November or early December 1988, the District contracted with Julee Quarve-Peterson, accessibility specialist, to determine the structural accessibility of three elementary school buildings in the District (Tr. 623-625).

25. Following receipt of Julee Quarve-Peterson's report, the District held a meeting to discuss options. That meeting was held February 2, 1989, and did have service providers, parents and administrators present. Following this meeting the District sent a summary of the meeting to the parents-but did not notify the parents of their decision regarding the question of structural modifications to Roosevelt Elementary School (Tr. 839-841).

26. The local hearing was held before Susan R. Weisman, a hearing officer appointed by the Commissioner because the parties did not mutually agree to the selection of a hearing officer.

27. The local hearing officer decided the District was required to structurally modify Roosevelt Elementary

School, and its failure to do so deprived Erika of her right to a free, appropriate public education and placement in the least restrictive environment.

28. The School District appealed the decision of the local hearing officer to the Commissioner asserting it should not be required to structurally modify Roosevelt Elementary School since the District has at least three elementary schools which Erika could attend and which are accessible to her.

29. Roosevelt Elementary School, the regular education school closest to Erika's home, was built in 1927, with an addition built in 1953 (S.D.E. #12 and #22, Tr. 549). The kindergarten wing is part of the 1953 addition and has ground floor access. A second wing containing the cafeteria/gymnasium is also part of the

1953 addition and has ground floor access from the outside. The wings are each connected to the original building but are not directly connected to each other (S.D.E. #12 and X22, Tr. 549). From the kindergarten wing to the original wing it is six steps up. From the original building to the cafeteria/gymnasium it is eleven steps down (S.D.E. #12, Tr. 656).

30. First, second, and third grade classes are housed in the original building on the first floor of Roosevelt with the principal's office, the nurse's office, a teachers' lounge, and a unisex bathroom not normally used by students. The computer room is also located on the first floor (S.D.E. #22).~

31. Fourth, fifth, and sixth grade classes are housed on

the second floor of the original building of Roosevelt with the library and the music room (S.D.E. ~22).

32. The learning disability resource room, a room for services to the hearing impaired, a teachers' lounge, and storage area are housed in the basement of the original building of Roosevelt Elementary School (S.D.E. #22).

33. Roosevelt is currently not handicapped accessible for a variety of reasons, including the size, weight and distance between the entry doors, the internal stairways, inaccessible bathrooms. sinks and fountains, and no elevator or ramps (a more complete description of the accessibility is set out in S.D.E. #10 and #12).

34. Roosevelt could be made handicapped accessible but would require structural modification (S.D.E. #10, #12, and #15).

35. Erika lives approximately five blocks from Roosevelt Elementary School. Kennedy Elementary School is approximately 3.8 miles from her home (Tr. 820).

36. At Washington Elementary School the following modifications would need to be made before the building could be considered fully accessible: provision of handicapped parking and a curb cut or curb ramp; replacement of doorknobs with door levers or adapters; a remount of the school telephone to a lower level and provision of an amplification device; lowering the position of the manual fire alarm controls and adding a visual component; lowering the

book stack heights in the library; provision of a ramp or lift device to the raised, fixed stage area in the gymnasium/auditorium; and modifications of one set of student restrooms (S.D.E. #12).

37. At Kennedy Elementary School some minor changes would need to be made as adding handrails in one ramped area, replacing doorknobs with door levers or adapters, repositioning and adding signs, providing a handicapped accessible public telephone, modifying the alarm system to provide a visual component, modifying the student restrooms to provide for handicapped accessible accessories, and lowering the book stack heights in the library (S.D.E. #12).

38. Two members of Erika's team (P.E. #1), Chris Wakefield, transition teacher (Tr. 228), and Kathleen

Bauer, physical therapist (Tr. 768), expressed their professional opinion that Erika's education needs can not be met at Roosevelt Elementary School because of the lack of accessibility for Erika.

CONCLUSIONS

1. Independent School District No. 77 has properly perfected its appeal and the Commissioner of Education has jurisdiction in this matter pursuant to Minn. Stat. 120.17 (1988) and Minn. Rule 3525.3800.

2. The notice of appeal was proper in form and content. That this decision was not rendered in 30 days was agreed to by both parties.

3. Erika Schuldt is a handicapped child as defined by

Minn. Stat. 120.17, Subd. 1, and thus is entitled to special education services pursuant to Minn. Stat. 120.17.

4. The regulations promulgated under the Education for All Handicapped Children Act require that the educational placement of handicapped children be:

(1) based on his or her individualized educational program;

(2) as close as possible to the child's home;

(3) selected from a continuum of alternatives as provided for by state law; and

(4) located in the school which the handicapped child would attend if he or she were not handicapped, unless the handicapped child's individualized placement requires some other arrangement. (34 CFR 300.552.)

(Emphasis added)

Minnesota law provides that every district must ensure that:

> To the maximum extent appropriate, handicapped children, including those in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when and to the extent that the nature or severity of the handicap is such that education in regular classes with the use of supplementary services cannot be

achieved satisfactorily;

(Minn. Stat. 120.17 Subd. 3a (d))

Furthermore, Minn. Rule 3525.0200 Subp. 18B defines what a regular education program is:

> "Regular education program" means the normal early childhood, elementary, secondary, or vocational education offerings, including instruction, training, aids, and services in the classroom or other appropriate places.

The primary consideration of the state and federal statutes and regulations is the individual needs of the handicapped child. This is clear from the comments to 34 CFR 300.552. That comment states, in part, that, "The overriding rule in this section is that placement decisions must be made on an individual basis." (Emphasis added)

Furthermore, Minn. Rule 3525.4400 Subp. 3 states:

> In deciding if the proposed action is to be sustained, in whole or part, the educational need of the child shall be determinative.

School districts are not required to provide all programs in each building. If every handicapped child were required to be placed in his or her neighborhood

school, federal and state requirements that school districts offer a continuum of alternative placements would be meaningless. The critical factor is the individual needs of the handicapped child.

5. The regulations promulgated under Minn. Stat. 120.17 identifying Minnesota's continuum of services define Level 3 and Level 4 special education services:

> In Level 4 a pupil receives direct instruction from a teacher for included. (Minn. Rule 3525.2340 Subp. 2 D) In Level 3 a pupil receives direct instruction from a teacher, or related services from a related service staff member for less than one-half of the day. Consultation and indirect services are included. (Hinn. Rule 3525.2340

Subp. 2 C)

Additionally, Minn. Rule 3525.2330 defines early childhood program alternatives as:

A. A consultation and indirect services program includes ongoing progress review, cooperative planning, demonstration teaching, modification and adaptation of the curriculum, supportive materials, and equipment. The services are provided to teachers, related services staff, support staff, parents, and public and nonpublic agencies to the extent that the services are related to the pupil's special education.

B. In a center-based program, a pupil is enrolled in a district-operated center and receives instruction related services at the center.

Early childhood programs are available for children who are under the age of seven prior to September 1 of that school year (Hinn. Rule 3525.2330 subp. 1). The record does not disclose whether the 1988-89 program was considered an early childhood program.

Because Erika was not seven until March 27, 1989, either definition of program alternatives could apply.

6. Minn. Rule 3525.2900 subp. 5 clearly states the need to provide certain notices to parents when a change in placement is anticipated:

> Notice in accordance with the provisions of part 3525.3700 is required whenever the providing school district proposes to initiate or change ... the level of educational placement

> as defined in the "Continuum of Placement Model," or proposes to initiate or significantly change ... the special education services for the child. For the purposes of this part, the terms initiate or change shall be construed to include the proposals set forth in Minnesota Statutes, Section 120.17, Subd. 3(b), clauses (c) (2), (3), (4), and (5). The notice shall be served prior to the initiation or change ... The notice shall be served within ten days after completion of the program plan and/or the refusal to initiate or change. (Emphasis added)

Minn. Stat. 120.17, Subd. 3(b), (c) (5), referenced above,

contemplates "initiate or change" to include:

> The proposed denial or removal of special education services for their child.

Minn. Rule 3525.3600 states that when a change in placement occurs, the notice to the parents must do three things:

> Prior to the performance of or refusal to perform a formal education assessment or reassessment as provided for in parts 3525.2600 to 3525.2800, the providing school district shall prepare and serve a notice which shall meet the requirements of parts 3525.3200 to 352~.3400. The portion of the notice which is specific to assessment or reassessment shall:
>
> A. Include a copy of the individualized educational program plan as described in article 3525.2900, Subp. 3;
>
> B. Inform the parents that the school district will

not proceed with the initial placement and provision of service(s) as defined in part 3525.0200 without prior written consent of the child's parents; and

C. Inform the parents that except for the initial placement and provision of service(s), the District will proceed with the proposed placement and provision of service(s) unless the parents object in writing on the enclosed "response form" or otherwise in writing within ten days after the receipt to the notice.

7. Erika's IEP for 1988-89 (October 25, 1988) included many changes in service from the 1987-88 IEP (October 14, 1987). She moved from "direct therapy and enrollment in an early childhood special education class" to integration fulltime into kindergarten with

support of the special education teaching assistant." Using Minnesota's Continuum of Services Model, Erika moved from Level 4 to Level 3 services. Using the Early Childhood Program Alternative Model, she moved from an early childhood "center-based" program to a "consultation and indirect services program.n Erika's involvement with regular education changes from "library books will be brought into the classroom" to "Erika is involved with all activities in kindergarten." On the IEP dated October 14, 1987, no regular education service provider is listed; on the IEP dated October 25, 1988, a regular education teacher is listed as her primary teacher. Although both programs are half-day programs, her service time changes from 790 minutes of early childhood special education services per week plus 295 minutes of therapy per week, to 145 minutes per week plus two

consultations per month.

These changes constitute a change in placement and all provisions of Hinn. Rule 3525.3600 apply.

8. The service identified by the change of placement began September 9, 1988, prior to the team meeting (October 25, 1988), prior to the identification of Erika's needs, and prior to the development of the IEP.

The Education of the Handicapped Act states: Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing and revising a handicapped child's individualized education program (34 CFR 300.342). It further states (34 CFR 300.343) that the meeting

must include the following participants: (l) A representative of the public agency, other than the child's teacher, who is qualified to provide, supervise the provision of, special education. (2) The child's teacher. (3) One or both of the child's parents, subject to Reg. 300.345. (4) The child, where appropriate. i (S) Other individuals at the discretion of the parents.

No meeting, prior to October 25, 1988, including the meetings held February 19, 1988, and May 19, 1988, met the standards of a team meeting as defined by regulation.

On September 9, 1988, the District unilaterally changed Erika's placement and redesigned a program for her outside the team process required by state and federal law.

9. On August 19, 1988, a meeting was held to conciliate the dispute regarding the IEP which was not developed until October 25, 1988. This meeting, while clearly an attempt by the parties to hold a conciliation conference, cannot be considered a conciliation conference. A conciliation conference, as contemplated by Minn. Rule 3525.3700 takes place after an IEP has been proposed by the team in writing. Here no IEP was drafted until October 25, 1988. The correct procedure dictates an assessment of the student's needs (for Erika, mobility, access and equipment needs should have been paramount), followed by the identification of services, followed by a placement decision. Compliance with these procedures is to be documented on the IEP. If any part of this process is contested, a conciliation conference is available to the parents.

The District did not comply with Minn. Rule 3525.3700.

10. While the memorandum dated September 1, 1988, from Lyle McFarling to the Schuldts, may have been sent prior to Erika's September 9, 1988 placement, it could not have included a copy of the IEP (as required by Minn. Rule 3525.3600 A), since the IEP was not written until October 25, 1988.

The District did not comply with Minn. Rule 3525.3600.

11. The District did not follow, in a timely manner, the process described in Minn. Rule 3525.2900-3600.

12. In Board of Education v. Rowley (458 U.S. 176, 102

S.Ct. 3034 1982) the Supreme Court stated: We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. (Emphasis added)

13. Despite the fact that the District did not meet the procedural requirements in a timely manner, there is no dispute that the goals and objectives of the proposed IEP were appropriate for Erika.

14. The procedures governing the determination of the location of Erika's properly constituted team meeting including all those knowledgeable about Erika's needs. At that meeting assessments should have been reviewed and needs determined. For Erika, needs

relative to her mobility should have been a priority. Based on those needs, placement options should have been discussed. If the District determined to hire Mr. Skaar to review the possibilities of structural modifications to Roosevelt Elementary School, his recommendations should have been discussed with input from the teachers most aware of Erika's needs. If Mr. Skaar's evaluation was not satisfactory, Ms. Quarve-Peterson could have been hired at that time to further evaluate the accessibility of Roosevelt, Kennedy, Washington, and Hoover Elementary Schools.

These discussions are appropriate for the team, not for administrative discussion only.

The purpose of the attendance of an administrative

designee at team meetings is to assure that the team's decisions can indeed be implemented. As stated in EHA Policy Letter #13 (EHLR 103:49):

> The 'representatives of the public agency' could be any member of the school staff, other than the child's teacher, who is 'qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children.'
>
> Each State or local agency may determine which specific staff member will serve as the agency representative. However, the representative should be able to ensure that whatever services are set out in the IEP will actually be provided and that the IEP will not be vetoed at a higher administrative level

within the agency. Thus, the person selected should have the authority to commit agency resources (i.e., to make decisions about the specific special education and related services that the agency will provide to a particular child). (Emphasis added)

Administrative additions or deletions ex post facto are not permissible.

15. Minn. Rules, Part 3525.4300 identifies the necessity of the school district to bear the burden of proof for the proposed action:

> The hearing officer shall preside over and conduct the hearing and shall rule on procedural and evidentiary matters, and his or her decision shall be based solely upon the

evidence introduced and received into the record. The school district(s) shall bear the burden of proof as to all facts and as to grounds for the proposed action. One purpose of the hearing is to develop evidence of specific facts concerning the educational needs, current educational performance, or presenting handicapping conditions of the person as it relates to the need for the proposed action. (Emphasis added)

Additionally, Minn. Rules, Part 3525.4400, provides:

Subpart 3. Decisions regarding educational placement. Based on an application of the standards, requirements, and principles set forth in Minnesota Statutes, section 120.17, subdivision 3a, and in Parts 3525.01200 to

3525.4700, the proposed action regarding the person's educational placement or special education services as set forth in part 3525.2900, subpart 3, shall be sustained in whole-or in part by the hearing officer only upon a showing of need by the school district(s) by a preponderance of the evidence. In deciding if the proposed action is to be sustained in whole or in part, the educational needs of the child shall be determinative. However, there shall be a presumption that among alternative programs of education, that to the maximum extent appropriate a primary placement in a regular public school class and program with appropriate special education services, is preferable to removal from the regular classroom. (Emphasis added)

16. Erika's placement in Level 3 special education with the goals and objectives as delineated on the IEP dated October 25, 1988, are appropriate to her educational needs. However, not all of Erika's current levels of performance and needs are stated in the IEP. The following should have been addressed: Erika's need for wheelchair access to all components of a regular education program; Erika's need for occupational and physical therapy, and a place to do that therapy; the need for storage space for Erika's equipment.

Minn. Rule 3525.2900 Subp. 3 states what must be in an IEP:

> Subp. 3. Content of individual educational program plan. The program plan must be based on the assessment data and other

information and be consistent with the requirement of nondiscrimination and the principle of least restrictive alternative and must include:

A. A description of the special education service needs of the student as determined by the staffing team and the names of the persons on the team.

B. A statement of annual goals and periodic review objectives for the special education services including the criteria for attainment.

C. The plan for, location of, and frequency of periodic review of the progress in reaching the prescribed educational goals and objectives.

D. The reasons for the type of education

placement and program including type of special education services to be provided, the location, amount of time, starting date, anticipated special education service duration, names, and school telephone numbers of those personnel responsible for providing the special education services. In accordance with the principle of least restrictive alternatives, substantiate why the proposed action is the most appropriate in terms of the person's educational needs.

E. The changes in staffing, transportation, facilities, curriculum, methods, materials, and equipment and other educational services that will be made

to permit successful accommodation and education of the student in the least restrictive alternative.

F. A description of the educational activities in which the student will participate in environments which include nonhandicapped students. This provision must be included in the plan only when the student's primary placement will be in a special education program. (Emphasis added)

17. The Office of Civil Rights has been consistent in its interpretation that all buildings need not be handicapped accessible:

It is not necessary that all buildings achieve program accessibility criteria as long as no student is denied

full participation in any program or activity offered (OCR/Section 504 Letters: EHLR 305:13). (Emphasis added)

The standard for achieving program accessibility in existing facilities, contained in Reg. 104.22(a), provides that a recipient must ensure that each program or activity receiving Federal financial assistance when viewed in its entirety is readily accessible to and usable by handicapped persons. The recipient is not required to make each of its existing facilities or every part of an existing facility accessible to handicapped persons, if its program or activity as a whole is accessible (OCR/Section 504 Letters: EHLR 305:15). (Emphasis added)

Reg 104.22 of the regulation implementing Section

504 requires that a recipient's program or activity, when viewed in its entirety, must be readily accessible to handicapped persons. Under this provision, a recipient is not required to make each existing facility or every part of a facility accessible to handicapped persons, so long as the program, as a whole, is accessible. Thus, a recipient is not required to make structural changes to existing facilities where other methods are effective in making the program or activity accessible, as long as priority is still given to offering the program in the most integrated setting appropriate (OCR/Section 504 Letters: EHLR 305:23). (Emphasis added)

Without structural change, Roosevelt Elementary School will not meet Erika's needs. However, the District is not required by law to make all of its

buildings accessible to students with handicaps. An appropriate program can be provided at other elementary schools within the district which are, or can reasonably be made, accessible to the student.

DECISION

1. The District has not complied with the applicable procedural requirements of federal and state law in proposing Erika Schuldt's 1988-89 individualized education program (IEP) and placement.

2. The placement at Kennedy Elementary School for 1988-89 did not deny Erika access to specialized instruction and related services which are individually designed to provide educational benefit.

3. The placement in Kennedy Elementary School did not deny Erika's right to placement in the least restrictive environment.

4. District No. 77 is not required to provide structural modifications to ~annoyed Elementary School which would otherwise be necessary to make lt accessible for Erika since there is another handicapped accessible school in the District in close proximity to Erika's home.

5. The local decision is in error because it required the District to modify Roosevelt Elementary School structurally and failed to give proper consideration to reasonable and available alternative school sites which are handicapped accessible.

ORDER

Prior to the beginning of the school year, the District is ordered to convene an appropriately constituted team and follow all applicable state and federal procedures and this decision in developing Erika's IEP for 1989-90.

Dated this 26 day of June, 1989.

/S/
Robert J. Wedl
Deputy Commissioner of Education
for Dr. Ruth E. Randall
Commissioner of Education

Appendix F

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

56-2103-3950-3

FOR INDEPENDENT SCHOOL DISTRICT NO. 77
MANKATO, MINNESOTA

In the Matter of the Due Process Hearing of Erika Schuldt	FINDINGS OF FACT, CONCLUSIONS AND DECISION

The above-entitled matter come on for hearing before the Honorable Susan R. Weisman, Administrative Law Judge, on February 27, 1989, through March 2, 1989, at Mankato Technical Institute, 1920 Lee Boulevard, Mankato, Minnesota.

Paul C. Ratwik, Attorney at Law, of the law firm Ratwik, Roszak, Bergstrom, Maloney, Bartel, P.A., Suite 302, One Appletree Square, Minneapolis, Minnesota 55425, appeared on behalf of Independent School District No. 77. Sonja D. Kerr and Lawrence J. Ringer, Attorneys at Law, Legal Advocacy for Persons With Developmental Disabilities, 222 Grain Exchange Building, 323 Fourth Avenue South, Minneapolis, Minnesota 55415, appeared on behalf of Erika Schuldt and her parents, Mary and Doug Schuldt.

The record closed on March 31, 1989, upon receipt of the parties' post-hearing briefs. Both parties waived the statutory time limit for issuing a decision in this matter.

This decision is final and binding upon the parties unless appealed to the Commissioner of Education within 15 calendar days of its receipt by the parties. All notices of appeal shall be in the form attached to this report and shall be mailed to all parties, including the Board of Education for the District, which shall be made a party to any appeal. In the event of an appeal, the hearing review officer shall issue a final decision within 30 calendar days after receipt of this decision and the hearing transcript. When an appeal is taken to the hearing review officer, a written transcript of the hearing held shall be made by the District and shall be accessible to the parents within five (5) days of the filing of the appeal. The hearing review officer may take additional evidence, if necessary, and may give the parties an opportunity to make written or oral argument. The decision of the hearing review officer will be the final decision in this matter unless further appeal is taken to the Minnesota Court of

Appeals pursuant to Minn. Stat. § 120.17, subd. 3b(f)(g) and (h).

STATEMENT OF ISSUES

The issues in this case are as follows:

1. Whether District 77 has complied with the applicable procedural requirements of federal and state law in proposing Erika Schuldt's 1988-89 individualized education program (IEP) and placement;

2. Whether the IEP proposed by District 77 for 1988-89 constitutes a free, appropriate public education, setting forth a program of educational services which are specially designed to meet Erika Schuldt's unique needs and which are reasonably calculated to enable her to receive educational benefits; and

3. Whether the IEP placement proposed by District 77 for 1988-89 constitutes the least restrictive environment.

Based upon all the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Erika Schuldt is the seven year old daughter of Mary and Doug Schuldt. Erika was born on March 27, 1982, and is the Schuldt's eldest child. She has two siblings: a sister, Kristine, 3 years old, and a brother, Todd, 7 months old. Erika and her family live on the west side of Mankato, within Independent School District No. 77 (hereinafter "the School District").

2. Erika was born with a form of spina bifida known as myelomeningocele at her middle back (T-10 or T-12 level), which has resulted in permanent paralysis from her waist down. Erika has no sensation or muscle control below that point and has no use of her legs. Erika's left side is weaker than her right side, in part because of the implantation of a shunt which prevents hydrocephalus, a swelling in the brain, from developing. Although seizures are always a risk

with the implantation of a shunt, Erika has no history of seizures. Erika functions within the average range of intelligence.

3. As a result of her paralysis, Erika cannot voluntarily urinate or move her bowels. Her bowel care is attended to by her parents, in their home, with the use of suppositories every other day. In addition, Erika's parents catheterize her at home five times per day to remove urine. At the present time, Erika is unable to independently perform any part of the catheterization process. She is expected to eventually learn to catheterize herself, possibly by age 12.

4. Erika transports herself primarily in a light-weight manual wheelchair, weighing approximately 10 pounds. She wears chest straps, which are needed to help stabilize her upper trunk while she is in the chair, and a seatbelt. Erika also wears plastic devices on her feet *(AFOs)* for stability and protection while in the wheelchair. She

currently needs some assistance with the AFOs when putting them on and taking them off.

5. Erika lives within the attendance area for Roosevelt Elementary School and would attend regular kindergarten classes at Roosevelt if not confined to a wheelchair. Roosevelt Elementary is located approximately 6 blocks from her home. Students from Roosevelt Elementary proceed to West High School, which includes a middle school, grades 7 and 8, as well as the high school, grades 9-12. Roosevelt Elementary School is located in a multiple-story building that is not presently wheelchair accessible. The building would need several structural modifications in order to become wheelchair accessible.

6. Erika has been temporarily placed in a regular kindergarten program at Kennedy Elementary School, pending the outcome of the due process proceedings. Kennedy Elementary is located on the east side of Mankato, a distance

of approximately 3.8 miles from Erika's home. Students from Kennedy Elementary advance to East High School, which includes a middle school, grades 7 and 8, as well as the high school, grades 9-12. Kennedy Elementary School is located in a single-story school building that is currently wheelchair accessible without needing additional major structural modifications.

7. Erika first came into contact with the School District as a pre-schooler when she attended a day activity center during the 1985-86 school year. Physical and occupational assessments were first conducted by the School District at that time. The following school year, 1986-87, Erika attended a private Montessori pre-school program. Funding for Erika's participation in the Montessori program was supplied by the School District. The School District conducted additional assessments and provided several services, including physical and occupational therapy, the consultative

services of a teacher of the physically handicapped, transportation, a management aide, and adaptive equipment. Erika's first Individual Education Program Plan (hereinafter "IEP") was drafted and approved for the 1986-87 school year, with goals that emphasized increasing her independence. (School District Ex. 1.)

8. During the summer of 1987, Erika attended a community-oriented socialization and skills maintenance summer class offered by this School District at Kennedy Elementary School. The class was taught by Chris Wakefield. Work was done with Erika's 1986-87 IEP, School District Ex. 1, to maintain the progress she had made. Toward the end of the summer, the Parents consulted with Ms. Wakefield about whether to place Erika in kindergarten for the 1987-88 school year and decided against doing so. Instead, they elected to enroll Erika in the School District's special education Transition Program, which was housed at

Franklin Elementary School. Ms. Wakefield and the Parents both thought that Erika could benefit from an additional year in a social education class to develop kindergarten readiness skills. Erika was notably adult-oriented and dependent at the time and needed to learn to socialize more with children. They also agreed that Erika needed to develop greater motivation for learning and to increase her learning pace.

9. The School District's Transition Program consists of an early childhood special education class held at one elementary school site. With the exception of Erika, the other special education students who participated in the 1987-88 transition program went to kindergarten in the morning, then came to Franklin Elementary for lunch and the afternoon transition class. Erika was transported to Franklin Elementary in a special bus for the handicapped and attended only the transition class.

10. Erika's 1987-88 transition class IEP, Parents' Ex. 1, was developed at a team meeting on October 14, 1987, and was written up by Chris Wakefield, the transition program teacher and Erika's case manager. The IEP calls for Erika's goals to be met through the provision of direct therapy and enrollment in an early childhood special education class, a level IV placement. At the Parents request, the School District scheduled Erika to receive her physical and occupational therapy prior to the starting time of the transition class when she was fresh, to maximize the effectiveness of the therapy services and to ensure that she would not have to miss any class time for therapy services. The IEP calls for a periodic review to be held in the Spring of 1988. This reflects the School District's general practice to conduct periodic reviews in the Spring in order to give IEP planning teams an opportunity to plan for the upcoming school year. At the parents' request, however, Erika's periodic review was

conducted a little earlier, in February of 1988. (Parents' Ex. 1.)

11. During 1987-88, the transition classroom was located on the ground floor of Franklin Elementary School. The Franklin Elementary School building is an older, multiple story building with no elevators or ramps. Erika's transition class IEP, Parents' Ex. 1, required access to library services and to the gymnasium, each of which presented mobility obstacles for Erika.

12. The Franklin Elementary library is on the second floor, up two flights of stairs from the transition classroom. Erika was unable to physically access the library unless she was carried up the stairs by staff members. This approach was utilized at the start of the school year, before Erika's 1987-88 transition class IEP was drafted. When the Parents learned of this practice, they objected. Both the Parents and the staff were uncomfortable with the idea of

Erika being routinely carried, for safety reasons and because of the risk to Erika of hip or knee dislocation if improperly lifted. Repeated dislocation could interfere with her ability to stand or walk with the assistance of special equipment, such as a parapodium. As a result of these concerns, the 1987-88 transition class IEP was drafted to require that library books would be selected for Erika by staff members or students and brought to the transition classroom each week for Erika to choose from. The remainder of the transition class students continued to go to the school library to select their books. The purpose of library instruction is to teach transition students to learn how to select, check out, return and care for books. The purpose of having transition students walk through the school to the library and back is to teach them proper hall-walking behavior.

13. Based on its experience with Erika from 1985-86, the School District knew at the start of the 1987-88

school year that Erika disliked being removed from her class to receive her therapy services because she did not want to miss any part of the classroom experience. The Parents expressed concern about the library arrangement in the 1987-88 IEP. They wanted Erika to be treated the same as other children so as not to feel left out. The Parents requested that books be brought from the library to the transition classroom for all students in the transition class, and not just for Erika. This suggestion was rejected by the School District because of the District's commitment to teaching transition class students proper hall-walking behavior and general library skills.

14. In order to gain access to one of two Franklin Elementary gymnasiums without using the interior stairs, it was necessary for Erika and her classmates to exit the building and travel outside along a covered catwalk for a distance of approximately 30 feet. They reentered through a

door in another wing of the building which is also at ground level. To accommodate Erika's needs, this approach was used by the transition class on a daily basis to get to the gymnasium and the playground.

15. Although there were other elementary schools within the School District with libraries and gymnasiums on the ground floor which were accessible without having to use interior stairs or outside walkways, the School District did not relocate the 1987-88 transition program to one of those structurally accessible schools. The transition program had been located at a structurally accessible school, Kennedy Elementary, during the 1985-86 school year, but was relocated to Franklin Elementary at the start of the 1987-88 school year because of overall space considerations.

16. During the 1987-88 transition year, Erika exhibited strong rote skills but experienced difficulty understanding abstract concepts and in problem-solving. When

working on skills which she found difficult, she was easily distracted and had difficulty staying on task. She exhibited a tendency to watch other students rather than to problem-solve for herself. Erika also displayed deficiencies in motor planning. Staff team members, including Erika's teacher, her aide, and her physical and occupational therapists, used verbal cues, visual demonstrations and repetition with Erika to teach and reinforce motor planning skills. Another problem exhibited by Erika was a dependency and over-reliance upon adults. She was encouraged to become more independent within the classroom, to interact more with the other children, and to decrease her reliance upon others, particularly adults, such as her teacher, aide, or therapists, except when necessary for mobility or other reasons. Academically, Erika's 1987-88 IEP addressed basic cognitive concepts, such as color and shape identification, pattern matching, quantitative concepts,

directional/oppositional concepts, and naming sets of categories.

17. The transition class IEP, Parents' Ex. 1, requires that Erika receive physical therapy for 155 minutes per week. The physical therapist, Sister Kathleen Bauer, is the only person documented on the IEP as responsible for the physical therapy services. She provided direct services to Erika two times a week in 45 minute sessions, for a total of 90 minutes per week throughout the 1987-88 school year. An aide, not licensed as a physical therapist or as a teacher, assisted during each of those 45 minute sessions and worked alone, unsupervised, with Erika two additional times each week to complete the remaining 65 minutes per week allotted for Erika's physical therapy services. The IEP also requires that Erika receive occupational therapy for 90 minutes per week. The occupational therapist, Mary Jane Hassel, is the only person documented on the IEP as responsible for the

provision of those services. Ms. Hassel provided Erika with direct therapy services for 45 minutes per week, with the remaining 45 minutes of therapy provided by an unsupervised aide who was not licensed as an occupational therapist. Erika also received 50 minutes per week of direct, adaptive physical education services.

18. Erika's spring periodic review meeting for the 1987-88 school year was held on February 19, 1988. Chris Wakefield, Erika's special education transition class teacher and case manager, served as the meeting's administrative designee. Also present were the Parents, Mary Jane Hassel, the occupational therapist, and Sandy Hasse, the adaptive physical education teacher. Sister Kathleen Bauer, the physical therapist, did not attend. The meeting participants did not discuss the issue of where Erika would attend kindergarten for the 1988-89 school year, and made no decision about this matter during the periodic review meeting.

19. During the course of the 1987-88 school year, the Parents informed Chris Wakefield that they wanted Erika to attend kindergarten at her neighborhood school, Roosevelt Elementary, for the 1988-89 school year. In approximately late February or early March, 1988, the Parents asked Ms. Wakefield whether they should take Erika to kindergarten round-up and, specifically, whether they should attend the round-up at Roosevelt Elementary. Kindergarten round-up is a spring gathering held in each elementary school for all children who will be enrolling in that school's regular kindergarten classes the following fall to meet the school staff and see the school. Ms. Wakefield explained that the School District's policy was to place children in their neighborhood schools whenever possible. She further explained that School District administrators were responsible for making the placement decision. At this point in time, Ms. Wakefield supported the Parents' desire to send Erika to her neighbor-

hood school and expressed her support to the Parents, saying that she supported the School District's policy and that it would be her desire for her own child to attend a neighborhood school. Ms. Wakefield communicated the Parents' placement request to Lyle McFarling, the School District's Director of Special Education, and to Linda Watson, the Assistant Director of Special Education, shortly after the periodic review meeting, in late February or early March of 1988.

20. On March 22, 1988, upon the recommendation of the Assistant Director of Special Education, Ms. Watson, the Parents and Erika attended Roosevelt Elementary's kindergarten round-up. Joel Botten, the principal of Roosevelt, represented the school district. The two Roosevelt kindergarten teachers were also present. Ms. Watson recommended that the Parents and Erika attend the Roosevelt round-up because it was the School District's long-standing

policy to place children in their neighborhood schools whenever possible and because, at that point in time, the School District anticipated placing Erika there.

21. During the spring months of March, April and May, 1988, both Mr. McFarling and Ms. Watson conferred with Chris Wakefield about the location of Erika's placement for 1988-89, specifically discussing Erika's educational programming and therapy needs, as well as her mobility needs. Ms. Wakefield voiced concerns about structural and physical limitations at Roosevelt Elementary which might present obstacles or barriers for Erika, such as the lack of wheelchair access from the kindergarten area to the first and second floors and space limitations/crowding in the kindergarten classrooms. Mr. McFarling and Ms. Watson also spoke with the physical and occupational therapists about Erika's therapy programming needs and discussed how those needs could be met at Roosevelt. Sister Kathleen Bauer, the

physical therapist, told Mr. McFarling that she was opposed to a Roosevelt placement for Erika because she thought the building could not provide Erika with independent mobility. Mr. McFarling reviewed Erika's IEP goals, objectives and services, as well as her periodic reviews and assessment data. He was informed by Ms. Watson that the Parents did not like Erika to be separated from the other students and that they objected to her being carried up or down flights of stairs on a regular basis.

22. In April of 1988, the Parents toured the Roosevelt school building with Mr. McFarling and Mr. Botten to consider the appropriateness of Erika's placement there for the 1988-89 school year. No decision regarding the location of Erika's placement was made at this time. Neither Mr. McFarling nor Mr. Botten expressed any concern about whether private therapy space or equipment storage space could be provided for Erika at the Roosevelt site.

23. On a separate occasion during April or May, 1988, Mr. McFarling toured the Roosevelt site with Mr. Botten and with Mr. C.R. Nelson, the Director of Elementary Education. All three men agreed, based on their walk-through and their corresponding discussion, that the structural problems they viewed at the Roosevelt school building could not be modified to meet Erika's needs.

24. In approximately late April or May of 1988, Ms. Watson, the Assistant Director of Special Education for the School District, concluded, based upon her discussions with staff and the Parents, her knowledge of the layout of the Roosevelt school building, and her knowledge of Erika's education file, that Erika's overall needs could not be met at Roosevelt. She then recommended to Mr. McFarling that Roosevelt Elementary would be an inappropriate placement site for Erika for the 1988-89 school year.

25. Between late April and early June of 1988, Mr. McFarling concluded that Roosevelt Elementary could not be made accessible for Erika Schuldt. Mr. McFarling based his conclusion primarily upon his visual inspections of Roosevelt Elementary and his discussions with Mr. Botten, the Roosevelt Elementary Principal, and Mr. C.R. Nelson, the District's Director of Elementary Education. Mr. McFarling drew this conclusion without consulting an architect. He thought it was obvious from looking at the school building that it could not be modified to meet Erika's needs and thought it was therefore unnecessary to consult an architect or any other building modification expert. Mr. McFarling did not inform the Parents that he had reached this conclusion.

26. In a May 19, 1988, meeting with Mr. McFarling in Mr. McFarling's office, the Parents reiterated their desire to have Erika placed at Roosevelt Elementary for the 1988-89 school year. The Parents emphasized that they

wanted to provide Erika with normal socialization opportunities within her neighborhood and wanted her to attend the same school that her younger siblings would be attending. No conclusions or decisions regarding Erika's placement were announced by Mr. McFarling at this meeting. Instead, Mr. McFarling informed the Parents that the School District wanted to consult with its attorney, Mr. Paul Ratwik, about the accessibility issues raised with regard to Erika's kindergarten placement.

27. On May 27, 1988, a meeting was held to discuss Erika's progress during the 1987-88 school year. The meeting was requested by the Parents and was chaired by Chris Wakefield. Also in attendance were the occupational therapist, Mary Jane Hassel, and, for a short period of time, the physical therapist, Kathleen Bauer. Although the Parents asked about the location of Erika's placement for 1988-89 during the meeting, this matter was not discussed at any

length. Erika made significant progress during the 1987-88 that is not documented on her 1987-88 IEP.

28. In a letter dated June 16, 1988, Mr. McFarling informed the Parents that the School District had been advised by its attorney that it did not have to make each of its elementary school buildings accessible for handicapped students if alternative, accessible sites were available anywhere within the School District which offered the same programs as were available at an inaccessible site. He informed the Parents that, as a result, the School District had decided to propose three elementary school sites which the School District deemed were "totally accessible" and capable of meeting Erika's needs for the 1988-89 school year kindergarten program: Washington, Kennedy, and Hoover Elementary Schools. Mr. McFarling indicated that the Parents could contact him if they wished to discuss the matter further. Nowhere in the letter is Roosevelt Elementary

School mentioned. The letter contains no notice to the Parents of their procedural rights. No response form was enclosed with the letter. (School District Ex. 13.)

29. Erika attended classes at Franklin Elementary during the summer of 1988. She continued to receive physical therapy throughout the summer. In order to access her therapy services, Erika had to exit the school building near her classroom, be assisted by an adult down a temporary wooden plank ramp covering 8 to 10 steps at a 40 degree angle, and travel outside, re-entering the building near the therapy room. Erika's parents did not recommend use of this ramp and received no formal notice of its use. Mrs. Schuldt learned about this arrangement one day when visiting the school.

30. By a letter to Mr. McFarling dated August 10, 1988, the Parents responded to Mr. McFarling's letter of June 16, 1988. They again expressed their desire to have Erika

placed at her neighborhood school, Roosevelt Elementary, and requested a conciliation conference. (School District Ex. 14.). Between June 16, 1988, and August 10, 1988, the School District waited for the Parents' response to its June 16, 1988, letter and took no steps to determine Erika-s 1988-89 educational program needs and draft her IEP during that time.

31. After receiving the Parents' request for a conciliation conference, the School District contacted Roger Skaar, an architect with a general architecture firm, and asked him to assess the feasibility of providing handicapped access for kindergarten students at Roosevelt Elementary. Prior to accepting this assignment, Mr. Skaar's firm had done some minor projects for the School District such as window or door replacements. Mr. Skaar was not given specific information about Erika Schuldt. He was told only that a wheelchair - bound student wanted to attend kindergarten classes at

Roosevelt. The School District did not ask Mr. Skaar whether he was knowledgeable about the federal and state laws and regulations or rules about handicapped accessibility.

32. On or about August 16, 1988, Mr. Skaar toured Roosevelt Elementary with the school Principal, Joe Botten, and conducted a survey of the facility. He pinpointed two general areas of concern: first, the need to provide access to the kindergarten area of the building; and, second, the need to provide access from the kindergarten area to the remainder of the building. Mr. Skaar agreed to prepare a written report of his observations and recommendations.

33. The conciliation conference was held on August 19, 1988, and was attended by the Parents, Mr. McFarling and Mr. Nelson. At the time of this meeting, the Parents were unaware that the School District had hired an architect to prepare a handicapped accessibility assessment of Roosevelt Elementary School. The School District had not

informed the parents about Mr. Skaar or his activities before the conference and did not address this matter at the conference. The conference discussion focused on a comparison between Washington and Roosevelt Elementary Schools. The Parents disputed the School District's decision to not propose Roosevelt for Erika's placement location. No agreement was reached and the meeting was adjourned.

34. On August 29, 1988, Mr. Skaar mailed his report and cost estimate to Mr. Nelson, the Director of Elementary Education. Mr. Skaar recommended that the School District conduct a walk-through of Roosevelt with handicapped students and their parents to determine whether the kindergarten area entrance door and vestibule would accommodate wheelchair entry and whether the restroom would be useable as-is, or with the addition of grab bars. Mr. Skaar stated that these changes, plus any other temporary, minor changes should be made as required to fit a particular

student's needs. Minor changes such as the above would not bring the kindergarten area up to state code regarding handicapped access, but would provide temporary, immediate use of the kindergarten rooms. He estimated that the cost for these modifications would range from $500 - $3,000. Mr. Skaar reported that the entire school building could be made handicapped accessible with the following modifications: the addition of ramps, handrails, new entrance doors, tactile room identification, and handicapped accessible water coolers; the installation of an elevator; the remodeling of two sets of restrooms and the vestibule at the kindergarten entrance; and, the replacement of existing hardware with lever handles (on required doors). He estimated that it would cost the School District approximately $160,000 to make all of these modifications, but stressed that these figures were very preliminary. (School District Ex. 10.) Mr. Skaar did not assess the specific needs of Erika Schuldt as part of his evaluation, as he had no

knowledge of her individual circumstances and had not been asked to do so.

35. On September 1, 1988, Mr. McFarling prepared a memorandum addressed to the Parents regarding Erika's 1988-89 kindergarten placement. In it, he summarized the positions taken by the Parents and the School District at the conciliation conference and noted their areas of agreement and disagreement. The Parents had stressed that Erika would experience a normal pattern of socialization if she could attend her neighborhood school along with the neighborhood children and her siblings, and that she would not have to be singled out by being transported across town to attend school. Mr. McFarling stated in the memorandum that although the School District respected the Parents concerns, it had chosen Washington Elementary School as the appropriate placement for Erika. He listed the following reasons for the District's determination: that Washington

Elementary was a single story, handicapped accessible building that had served several handicapped children with mobility problems such as Erika's over the years; that a placement there would allow Erika to develop normal socialization experiences with same-age peers; that the content of Erika's educational program was not in dispute; that even though the school District acknowledged that Roosevelt Elementary could be modified to provide full accessibility, the District believed that the modifications, if made, would tend to magnify the differences between handicapped and non-handicapped children; that while the School District agreed that ramps and elevators could be used safely, it preferred, for safety reasons, to use a single floor building for children in wheelchairs; that in the long run, the District believed single story building would be more conducive if Erika made a transition to an electric wheelchair; that transportation was not a factor, since Erika would need

to ride to school using a lift bus or some other special form of transportation regardless of which school she attended; and, that time in transit was not a significant factor. The School District estimated that it would cost approximately $160,000 to make Roosevelt accessible. Mr. McFarling stated that the School District's position was that it would be required to expend the funds only if it could not provide Erika with the program of education she needed at an alternative, accessible site. He added that the School District had concluded that such expenditures were unjustified because the District believed that, even with the structural modifications, Roosevelt could never be as accessible a site as Washington Elementary. A Parent Response Form, as well as information regarding the Parents' rights and the hearing process were included with the memorandum. Mr. Skaar's report was not mentioned in or attached to the memorandum. (School District Ex. 15.)

36. The memorandum prepared by Mr. McFarling was the first notice to the Parents that the School District had sought an estimate of the costs involved in making structural modifications to Roosevelt Elementary. After reading the memorandum, they contacted the School District to ask who had made the estimate and whether they could see a copy of the report on which the estimate was based. In response to the Parents' request, the School District provided the Parents with a copy of Mr. Skaar's report.

37. On September 7, 1988, the Parents met again with Mr. McFarling. They objected to placing Erika at Washington Elementary, even on a temporary basis. They objected, in part, because they believed Washington Elementary had become stigmatized as the elementary school within the District where handicapped children were frequently placed. The Parents re-asserted their interest in Roosevelt but were told that the School District no longer viewed Roosevelt

as a good option. They requested a due process hearing, but noted that they were willing to continue to negotiate. The Parents agreed to place Erika at Kennedy Elementary School on a temporary basis if the School District would not allow her to attend Roosevelt on a temporary basis, pending the outcome of the hearing.

38. On September 8, 1988, Mr. McFarling informed Mary Schuldt that for safety reasons, the School District would not allow Erika to attend Roosevelt on a temporary basis, pending the outcome of the hearing.

39. Erika began attending kindergarten classes on a temporary basis at Kennedy Elementary School on September 9, 1988, as a student on a regular afternoon kindergarten class taught by Ms. Barbara Turpin.

40. On September 28, 1988, Mr. Skaar, Erika, and her father, Doug Schuldt, toured Roosevelt Elementary School together. On this "walk-through," Mr. Skaar deter-

mined that Erika can enter the school building in her wheelchair through the kindergarten entrance doors and can manipulate her wheelchair through the kindergarten vestibule area, even though both the entrance doors and the vestibule are technically inadequate in dimension. There was no mention before, during, or after the tour of any concerns by the School District about possible circulation or mobility limitations within the Roosevelt kindergarten classrooms or about possible problems finding adequate storage space for Erika's supplementary equipment.

41. On or about October 4, 1988, the parties agreed to set aside November 7-10, 1988, for the due process hearing.

42. On October 25, 1988, a team meeting was held to develop a new, proposed IEP for Erika's kindergarten program. A new IEP was needed because the prior year's IEP, Parents Ex. 1, was geared specifically toward the early

childhood special education transition class and did not address Erika's current kindergarten educational needs. Between September 9, 1988, when Erika began attending kindergarten classes at Kennedy Elementary, and October 25, 1988, when the IEP planning meeting was held, assessments of Erika were conducted by the physical and occupational therapists and by Erika's case manager. Kennedy Elementary kindergarten integration specialist, Jacqui Templin-Woodwick. There was no discussion at the IEP planning meeting about the location of placement of services, and no discussion about whether programmatic accommodations would need to be made or could be made for Erika at Roosevelt Elementary, the school Erika would have attended but for her disability and the location requested by the Parents, or whether Erika's IEP required services which could not be made available at Roosevelt. No reference was made to Mr. Skaar's report.

43. After the IEP team planning meeting, Ms. Jacqui Templin-Woodwick drafted a new, proposed IEP, School District Ex. 6, leaving blank the section of the IEP that is devoted to an explanation of the location of placement of services. That section was later added by Mr. McFarling, who had not attended or otherwise participated in the IEP planning meeting. In the proposed IEP, Mr. McFarling repeated the explanation he had given in his September 1, 1988, memorandum to the Parents, School District Ex. 15, applying the same attributes to Kennedy Elementary as he had earlier applied to Washington Elementary. (School District Ex. 6.)

44. On October 31, 1988, pursuant to ongoing negotiations between the parties, the School District agreed to make arrangements to have an independent handicapped accessibility evaluation conducted at Roosevelt, Kennedy and Washington Elementary Schools at the School District's

expense, and to postpone the due process hearing pending the completion of the evaluation report. The parties later agreed to the selection of Ms. Julie Quarvee-Peterson, an experienced, professional assessor of buildings regarding compliance with federal handicapped accessibility requirements, to conduct an independent assessment of the three elementary schools.

45. On November 12, 1988, the Parents returned the Parents Response Form, rejecting the proposed IEP. They voiced no objection to the content of the proposed educational program, but continued their objection to the location of placement of services.

46. On December 27, 1988, Ms. Quarvee-Peterson met for the first time with Mr. McFarling. Mr. McFarling gave her a copy of a letter prepared by counsel for the Parents, School District Ex. 11, which outlined the parameters of the assessment to be conducted, as agreed to by the

parties. Ms Quarvee-Peterson then surveyed Washington, Kennedy and Roosevelt Elementary Schools.

47. On January 5, 1989, Ms. Quarvee-Peterson met again with Mr. McFarling. She also met and observed Erika Schuldt at Kennedy Elementary School for approximately one hour in the company of the occupational therapist, physical therapist, special education director and the kindergarten integration specialist. During this time, she was able to observe Erika's mobility needs and her equipment. Ms. Quarvee-Peterson also met with the Parents for approximately one and one-half hours and conducted an additional site survey of Roosevelt Elementary. While at Roosevelt, she spoke with several staff members, including the principal, Mr. Botten, and the librarian. (School District Ex. 12.)

48. In her written report, School District Ex. 12, Ms. Quarvee-Peterson states with regard to Roosevelt Elementary, that Erika can enter the-kindergarten rooms and

can circulate adequately within the rooms as presently arranged. Although the kindergarten area restrooms are inaccessible to Erika, she does not need access to the toilet. Erika's kindergarten restroom needs could be met by raising the bathroom sink. The first and second floors of Roosevelt can be made accessible by internal ramping or by the addition of two mechanical lifts, one for each floor, at an estimated cost of $32,000 - $40,000 per lift, including construction of a shaftway. An unenclosed exterior ramp could provide Erika with access from the outside to the ground floor cafeteria/gym, and to the first floor, at a cost of $30,000, possibly less, to build, depending on the materials used and the rates charged by the contractors. Ms. Quarvee-Peterson concurs with Mr. Skaar that an elevator could be installed as an alternative to the use of mechanical lifts, or used in combination with ramps and/or lifts. She adds that if the administration could devise a way to move the library from the second

floor to the first floor, the second floor might not have to be made accessible. Additional modifications which she indicated would be required to make Roosevelt fully accessible include the replacement of door hardware on designated doors and the modification of one set of student (gang) rooms (boys and girls) with handicapped accessible fixtures and accessories; the provision of a curb cut or driveway apron for bus access; the provision of hard surface pathways and adaptive play equipment in the playground area; and, a ramp or lift device to provide access to the gymnasium/auditorium stage. (School District Ex. 12) Ms. Quarvee-Peterson estimates that the Roosevelt site could be modified for significantly less than Mr. Skaar's $160,000 estimate, depending on the materials used and the rates charged by contractors. She concurs with Mr. Skaar that the modifications could be accomplished in phases.

49. Ms. Quarvee-Peterson also reported on Kennedy and Washington Elementary Schools. At Kennedy, some minor changes would need to be made for the building to be considered fully accessible, such as adding handrails in one ramped area, replacing doorknobs with door levers or adapters, repositioning and adding signs, providing a handicapped accessible public telephone, modifying the alarm system to provide a visual component, modifying the student restrooms to provide for handicapped accessible accessories, and lowering the book stack heights in the library. (School District Ex. 12.)

50. At Washington Elementary, the following modifications would need to be made before the building could be considered fully accessible: provision of handicapped parking and a curb cut or curb ramp; replacement of doorknobs with door levers or adapters; a remount of the school telephone to a lower level and provision of an

amplification device; lowering the position of the manual fire alarm controls and adding a visual component; lowering the book stack heights in the library; provision of a ramp or lift device to the raised, fixed stage area in the gymnasium/auditorium; and, most significantly, complete modifications of one set of student restrooms, since none within the building are currently handicapped accessible.

51. On February 2, 1989, a staffing meeting was held to review Ms. Quarvee-Peterson's assessment in conjunction with Erika's educational programming needs. The meeting was chaired by Ms. Linda Watson, the Assistant Director of Special Education, and was attended by all of the members of Erika's educational team, including the Roosevelt staff members who would work with Erika if she were to attend Roosevelt. The Parents, Ms. Quarvee-Peterson, Mr. McFarling and counsel for both parties were also present. Ms. Quarvee-Peterson summarized her findings, which she

also supplied in her written report, School District Ex. 12. The School District announced at the meeting that it had decided not to pursue Washington Elementary as a site for Erika s educational programming. Therefore, only Kennedy and Roosevelt Elementary Schools were discussed. Ms. Quarvee-Peterson stated that Erika could presently access the kindergarten classroom area at Roosevelt and explained the various types and costs of modifications which would be required to provide Erika with access to the remainder of the building. Many different structural modifications were discussed, as well as some programmatic modifications which were in response to identified structural limitations. Ms. Quarvee-Peterson reiterated that Kennedy Elementary required only minor modifications to become fully accessible to the handicapped. Kennedy staff members stated that Erika is able to move independently throughout the Kennedy school building, with the exception that the door to the outside area

where her bus drop-off is located too high for her to open. The School District did not indicat- any concerns at this meeting about a need for private therapy space and storage space for Erika's equipment, or crowding/access within the kindergarten area at Roosevelt.

52. Following the February 2, 1989, meeting, Mr. McFarling discussed his concerns about the location of Erika's placement with Ms. Watson. Mr. McFarling concluded that Kennedy Elementary School was the appropriate placement location for Erika's educational program. No further team meetings were held to discuss this issue. The School District provided no written notice to the Parents as to the District's position following the February 2, 1989, staffing meeting.

53. An undated and unsigned summary of the February 2, 1989, staffing meeting was received by the Parents on February 19, 1989. The summary was prepared

by Mr. McFarling, with Ms. Watson's assistance. (School District Ex. 20.)

54. There are nine elementary schools within the School District. Hoover Elementary is the only handicapped accessible elementary school located within the service area of West High School, but Hoover services only kindergarten through grade 4. Students from Hoover Elementary attend Garfield Elementary for grades 5 and 6. Garfield Elementary School is located in an older, multiple story building and is not wheelchair accessible. At the present time, students who are confined to wheelchairs are unable to proceed uninterrupted from kindergarten through grade 6 with non-disabled students who live within the west service area and are placed in elementary schools in the east service area. Both West and East High Schools are handicapped accessible schools.

55. Hoover Elementary was proposed by the School District as an appropriate placement location for Erika

in its June 16, 1988 letter to the Parents, but was later withdrawn from consideration by the School District because of the fact that Erika could only be serviced there through grade 4 and would not be able to continue on to grades and 6 at Garfield Elementary with her non-handicapped peers.

56. In the Kennedy Elementary kindergarten class, Erika has shown herself to be a cooperative child who learns best with her peers. She is able to name letters, read some words, print numerals 1-20, and print her first and last name. Erika is very social and wants to be with other people. She can travel in her wheelchair at the same pace as her class-mates walk and can manipulate around other people in the hallway or ask them to move, if necessary. Erika can push herself from the Kennedy Elementary bus drop-off point to the therapy room, a distance of approximately 240 feet, in 3 and 1/2 minutes. While seated in her wheelchair, she can remove her outside Jacket, put on the wheelchair brakes, and

take off her seatbelt in 3 and 1/2 minutes. (School District Ex. 5.) On one occasion, Erika became confused and could not recall the method she routinely used to remove her coat when a substitute aide suggested an alternative approach for taking off her coat.

57. Erika uses her wheelchair, a standing frame, a walker, a booster chair, and a standing table in the kindergarten classroom. the standing frame, walker, booster chair, and standing table can be stored in an area of approximately eight square feet. During kindergarten class, Erika generally sits in her wheelchair or uses the standing frame in combination with the walker or standing table. The standing table, which functions for reading, writing or doing puzzles, is used infrequently because it is time-consuming to place Erika in it, and because she is able to sit in her wheelchair at a larger table which allows her to sit with her classmates for those activities.

58. Erika currently receives both physical and occupational therapy services from the School District. Both therapies are provided before the start of Erika's daily kindergarten class, so that Erika misses no class time for therapy services. Erika exhibits poor upper body strength, as well as poor hand and finger strength and muscle tone. These needs are addressed in her physical and occupational therapy goals and objectives. An ongoing goal for Erika is to increase her capacity to be independently mobile. Erika receives 135 minutes per week of physical therapy and 90 minutes per week of occupational therapy, plus the consulting services of the adaptive physical education teacher two times per month, and the consulting services of a kindergarten integration specialist once per week for 20 minutes.

59. The physical therapist uses several different pieces of equipment when providing therapy services, including a jet-mobile, a wheel-o-whirl, two floor mats, a

push-up bar, a formica board, a rocker board, and a vestibule board. Some of these pieces of equipment are used exclusively with Erika and, from a practicality standpoint, require storage space on the school premises. Others are used with more than one student and are regularly transported from school to school by the physical therapist, who services students at several school sites. Generally, the physical therapist uses only one or two pieces of equipment per therapy session.

60. One of the objectives addressed by the occupational therapist is Erika's dressing skill. It is important for Erika to work on this skill at home, outside school hours, where it is purposeful. A booster/dressing chair is used at school for dressing exercises in occupational therapy.

61. Because Erika's kindergarten program lasts half a day, she does not need to be catheterized or to move her bowels at school. Erika takes medication to expand her

bladder capacity. She has had approximately three toileting accidents at school during the current school year, 1988-89. When accidents occur, she needs a private space to change her clothing. It is important for Erika and her aide to handle a toileting accident discreetly, so that other students will remain unaware that an accident has occurred.

62. Roosevelt Elementary School's original building, built in 1927, is connected by internal ramps to a 1953 addition. The school has a basement, a ground floor, a first floor and second floor.

63. Roosevelt's kindergarten wing, part of the 1953 addition, contains of two classrooms. Each of these classrooms contains a restroom, wash basin and storage closet. A vestibule leads in from the west-facing Hubbell Avenue entrance. There is ground floor access at the Hubbell Avenue entrance. The kindergarten wing connects to the west end of the first floor by going up a flight of six steps inside the

building. In order to allow for wheelchair mobility from the kindergarten wing to the west end of the first floor, a ramp or lift device needs to be added. An enclosed ground level entrance to the northwest kindergarten classroom and ramp to the first floor was proposed by Mr. Skaar at a first floor northwest entrance from 5th Street, currently accessible by six external steps. (See School District Ex. 22, locations 4 and 6.)

64. The cafeteria/gym, also part of the 1953 addition, is separated from the first floor on the south side of the building by another set of internal stairs. There is ground floor access to the cafeteria/gym area from the south-facing 6th Street building entrance. A ramp and/or lift device would allow for wheelchair mobility between the ground floor and the first floor in this portion of the building. The installation of an elevator is also possible at this approximate location. An elevator would allow access from the ground floor to the

first and second floors. (See School District Ex. 22, location 10.) There are two storage closets located across the hall from the cafeteria/gym. One holds the cafeteria tables and is filled to capacity. The other storage closet holds miscellaneous equipment and is not filled to capacity.

65. The first floor of Roosevelt contains three first grade classrooms, three second grade classrooms, and three third grade classrooms, a computer room, used by kindergarten through grade 6, two sets of student (gang) restrooms, two for girls and two for boys, small bookroom, an art office/storage room, and the main gymnasium/auditorium and stage. The first floor also houses the administrative offices, which include the principal's office, a unisex bathroom, the nurse's office and the teachers' lounge. (School District Ex. 22.)

66. The second floor of Roosevelt houses three fourth grade classrooms, three fifth grade classrooms, and

three sixth grade classrooms, plus the library, the music/band room, two small bookrooms, a small work room/speech office, and two sets of student restrooms. The library occupies the space of approximately two and a half classrooms. The music room occupies the space of one classroom. (School District Ex. 22.)

67. The basement area contains Roosevelt's Resource Room, which is used to provide services to learning disabled special education students, and a separate room for the provision of services for hearing impaired children. (School District Exhibit 22.)

68. There are two playgrounds at Roosevelt. The kindergarten - grade 2 playground is located on the north side of the building, along 5th Street. The grade 3-6 playground is located on the south side of the building. (School District Ex. 22.)

69. The 1988-89 kindergarten classes at Roosevelt are crowded. There are approximately 80 students enrolled in the kindergarten program, divided into three sections of 27-28 students, two in the morning and two in the afternoon. There are also approximately 80 kindergarten students enrolled at Kennedy Elementary. However, Kennedy has divided the students into four sections of 20 students each. The kindergarten classrooms at Roosevelt are smaller in size than those at Kennedy and are therefore moro prone to crowded conditions.

70. Each kindergarten classroom at Roosevelt has its own storage room. The storage room in the southwest kindergarten classroom is a possible location for a mechanical lift from the kindergarten area to the first floor.

71. The empty afternoon kindergarten room at Roosevelt has the potential to be used as a private therapy space for Erika.

72. Storage space for Erika's equipment can be made available within Roosevelt Elementary School.

73. The School District is financially able to make the structural modifications recommended by either Mr. Skaar or Ms. Quarvee-Peterson at Roosevelt Elementary School within the resources available to the District.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That School District 77, the Administrative Law Judge and the Commissioner of Education have jurisdiction in this matter pursuant to Minn. Stat. § 120.17, subd. 3b(d) and 14.55 and Minn. Rule Part 3525.4000.

2. That Independent School District No. 77, Mankato, Minnesota, at the district of residence, has the primary responsibility for providing an appropriate program of special education for Erika Schuldt.

3. That the notice of hearing in this matter was proper in form and content.

4. That this decision has not been rendered within 45 calendar days from the date of receipt of the parents' request for a hearing for purposes of Minn. Stat. S 120.17, subd. 3b(e), but that the delays which occurred were mutually agreed to by both parties.

5. That Erika Schuldt is a seven year old handicapped child as defined in Minn. Stat. § 120.03, subd. 3, who is entitled to special education services appropriate to her needs pursuant to Minn. Stat. § 120.17.

6. That Minn. Rule Part 3525.4400, Subp. 3 provides as follows:

> Subp. 3. Decisions regarding educational placement. Based on an application of the standards, requirements, and principles set forth in Minnesota Statutes, section 120.17, subdivision 3a, and in parts 3525.0200

to 3525.4700, the proposed action regarding the person's educational placement or special education services as set forth in part 3525.2900, subpart 3 shall be sustained in whole or in part by the hearing officer only upon a showing of need by the school district(s) by a preponderance of the evidence. In deciding if the proposed action is to be sustained, in whole or part, the educational needs of the child shall be determinative. However, there shall be a presumption that among alternative programs of education, that to the maximum extent appropriate, a primary placement in a regular public school class and program with appropriate special education services, is preferable to removal from the regular classroom

The hearing officer may sustain a proposed action that would result in the child being removed from a regular education program only when, and to the

extent that, the nature or severity of the handicap is such that education in the program with the use of special education services cannot be accomplished satisfactorily, and there is indication that the child will be better served with an alternative program or services. This decision shall be made in accordance with the principle of least restrictive alternatives. The hearing officer shall also determine whether the school district(s) sufficiently considered alternative educational programs including special education services and opportunities and at the hearing, may receive any additional evidence presented by any interested party or person as to the availability and suitability of reasonable and viable educational alternatives. If the hearing officer concludes that there are no reasonable or viable educational alternatives the findings shall so state.

7. That pursuant to Minn. Rule Part 3525.4400, the burden of proof is upon the School District to show, by a preponderance of the evidence, a need for the proposed action regarding Erika Schuldt's educational placement or special education services.

8. That pursuant to Minn. Rule Part 3525.4400, a presumption exists that among alternative programs of education, to the maximum extent appropriate, a primary placement in a regular public school class and program with appropriate special education services, is preferable to removal from the regular classroom.

9. That pursuant to Minn. Rule Part 3525.4400, a proposed action that would result in the removal of Erika Schuldt from a regular education program may be sustained, in whole or in part, only when, and to the extent that, the nature or severity of her handicap is such that education in the program with the use of special education services cannot

be accomplished satisfactorily, and there is indication that she will be better served with an alternative program or services.

10. That pursuant to Minn. Stat. § 120.17, subd. 3b(i), pending the completion of proceedings pursuant to this subdivision, unless the district and the parents of Erika Schuldt agree otherwise, Erika shall remain in her current educational placement.

11. That the School District and the Parents have agreed that Erika shall attend Kennedy Elementary School pending the outcome of the due process proceedings.

12. That Minn. Rule Part 3525.2900, Subp. 3 D and E provides as follows:

> Subp. 3. Content of individual educational program plan. The program plan must be based on the assessment data and other information and be consistent with the requirement of nondiscrimination and the

principle of least restrictive alternative and must include:

D. The reasons for the type of education placement and program including the type of special education services to be provided, the location, amount of time, starting date, anticipated special education service duration, names, and school telephone numbers of those personnel responsible for providing the special education services. In accordance with the principle of least restrictive alternatives, substantiate why the proposed action is the most appropriate in terms of the person's educational needs.

E. The changes in staffing, transportation, facilities, curriculum, methods, materials, and equipment and other educational services that will be made to permit successful accommodation and education of the student in the least restrictive alternative.

13. That Minn. Rule Part 3525.2900, Subp. 5 provides as follows:

> Subp. 5. Notice to parents after completion of program plan and prior to placement. Notice in accordance with the provisions of part 3525.3600 is required whenever the providing school district proposes to initiate or change or refuses to initiate or change the level of educational placement as defined in the "Continuum of Placement Model," or proposes to initiate or significantly change the special education services for the child. For the purposes of this part the terms initiate or change shall be construed to include the proposals set forth in Minnesota Statutes, section 120.17, Subdivision 3b, clauses (d) (2), (3), (4), and (5). The notice shall be served prior to the initiation or change or refusal to initiate or change the educational placement or special education services

i. The notice shall be served within ten
ompletion of the program plan and/or the
initiate or change.

at Minn. Rule Part 3525.3600 A and C
provws:

the initiation or change or the refusal to
or change a child's educational placement or
education services. as set forth in part
2900, subpart 5. the providing school district
prepare and serve a notice which shall meet the
irements of parts 3525.3200 to 3525.3400. The
tion of the notice which is specific to the educa-
nal placement and provision of services shall:

include a copy of the individual educational
rogram plan as described in part 3525.2900, subp.
5;...

C. inform the parents that...the district will proceed with the proposed placement...unless the parents object in writing on the enclosed "response form"...

15. That 34 C.F.R. § 300.505, regarding the written notice which must be given to a parent of a handicapped child before a change or a refusal to change an educational placement is made, provides as follows:

(a) The notice under § 300.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents...; (2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected; (3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and (4) A description

of any other factors which are relevant to the agency's proposal or refusal.

16. That 34 C.F.R. § 300.504 (a) provides that written notice must be given to the parents of a handicapped child a reasonable time before a public agency (1) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or (2) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

17. That 34 C.F.R. § 300.550 (b) (1) and (2) provides as follows:

> (b) Each public agency shall insure (1) That to the maximum extent appropriate, handicapped children are educated with children who are non-handicapped, and (2) That special classes, separate schooling or other

removal from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily

18. That 34 C.F.R. § 300.552 (a) (1), (2), (3), (c) and (d) provide as follows:

Each public agency shall insure that (a) each handicapped child's educational placement: (1) Is determined at least annually, (2) is based on his or her IEP, and (3) is as close as possible to the child's home;. . . (c) Unless a handicapped child's IEP requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and (d) In selecting the restrictive environment, consideration is given to any potential

harmful effect on the child or on the quality of services which he or she needs.

19. That the School District has failed to fully comply with the applicable procedural requirements of federal and state law with regard to the manner in which it developed and prepared the content of Erika's proposed IEP and gave notice of changes in placement or proposed changes in placement or refusals to make changes in placement and/or significant changes in special education services between March of 1988 and October of 1988.

20. That the content of the proposed IEP prepared by the School District provided inadequate statements and descriptions of program and placement alternatives that were considered and the reasons they were rejected.

21. That the School District has failed to meet its burden of proof that the proposed IEP constitutes a free, appropriate public education.

22. That the School District has failed to meet its burden of proof that the proposed full-time program and placement is in the least restrictive environment.

23. That the School District has failed to meet its burden of proof that Erika's educational needs necessitate or require that she be placed at Kennedy Elementary School.

24. That the School District has failed to meet its burden of proof that in accordance with the principle of least restrictive alternatives, and with the addition of structural modifications, Erika's regular education placement at Roosevelt Elementary School cannot be accomplished satisfactorily.

25. That the structural modifications and other special education services appropriate to Erika's needs can be reasonably provided within the resources available to School District 77.

26. That the estimated cost of making all of the proposed structural modifications which would make Roose-

velt Elementary School accessible to all handicapped children, including Erika Schuldt, is approximately $160,000, or less, and that the modifications could be accomplished in phases.

27. That the School District did not sufficiently consider alternative educational programs and placement opportunities, including structural modifications of Roosevelt Elementary, when it developed the proposed IEP and placement.

28. That the above conclusions are made for the reasons set forth in the Memorandum which follows and which is incorporated by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

DECISION

The individual education program plan (IEP) and placement proposed by Independent School District 77 does not fully comply with the applicable federal and state

procedural requirements of law, does not provide Erika with a free, appropriate public education and does not constitute the least restrictive environment. The proposed IEP and placement therefore cannot be sustained. The matter is remanded to the School District for the development of a new IEP in keeping with this Decision.

Dated this 1st day of May, 1989.

/S/

SUSAN R . WEISMAN

Administrative Law Judge

Memorandum attached.

NOTICE

Pursuant to Minn. Stat. § 120.17, subd. 3b(f), this decision may be appealed to the Commissioner of Education by the parents, or school district within 15 calendar days of receipt of this decision by using the form attached to this decision.

Court-reported: Southwest Reporters, Inc., Shirley Paradis. Volumes I-IV

MEMORANDUM

This case arises under Minn. Stat. § 120.17, and Minn. Rule Parts 3525.0200 *et seq.* which regulate the education of handicapped children within Minnesota, and under 20 U.S.C. § 1401-1461, the Education of All Handicapped Children Act (hereinafter "EHA"), and 34 C.F.R. §§ 300.4-.556, the governing provisions under federal law. The School District contends that the development and implementation of the proposed individualized educational program plan and

placement complies with the applicable procedural requirements of federal and state law, that the proposed IEP provides Erika Schuldt with a free, appropriate public education, in that it provides a program of educational services which are specially designed to meet her needs and which are reasonably calculated to enable her to receive educational benefits, and that the proposed IEP placement constitutes the least restrictive environment. The parents dispute each of these contentions.

Pursuant to Minn. Rule Part 3525.4300, the School District bears the burden of proof as to all facts and as to the grounds for the proposed action. Minn. Rule Part 3525.4400, Subp. 3, additionally specifies that the proposed action regarding educational placement or special education services shall be sustained by the hearing officer in whole or in part only upon a showing of need by the School District by a preponderance of the evidence.

1. Whether the School District Has Met Its Burden of Proof That It Has Complied With the Applicable Procedural Provisions of Federal and State Law.

The primary purpose of the EHA is to encourage states, through the use of various financial incentives, to provide a "free appropriate public education" for all handicapped children. In keeping with this purpose, the federal laws and regulations contain numerous procedural requirements which are intended to ensure that significant decisions regarding the educational plan or placement of handicapped children are properly made and that the parents or guardians of handicapped children have the opportunity to give input before such decisions are made. 20 U.S.C. § 1412(1). *Concerned Parents v. New York City Board of Education*, 629 F. 2d 751 (1980),

The importance of the procedural safeguards embodied within the EHA was recognized by the U.S. Supreme Court

in the case of *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982), wherein the Court adopted a two-tier test to establish whether a school system has complied with the requirements of the Act. The first part of the test asks whether the school system has complied with the applicable procedural requirements of the EHA. The second part of the test asks whether the resulting IEP, having established procedural compliance, is reasonably calculated to provide personalized instruction with sufficient supportive services to permit a child to benefit from the instruction. The *Rowley* decision makes clear that both portions of the test must be answered in the affirmative in order for a school system to establish overall compliance with the Act. *Rowley, supra*, 458 U.S. at 206-207, 102 S.Ct. at 3050-51; *Hall by Hall v. Vance County Board of Education*, 774 F.2d 629, 635 (1985).

The Parents in the case at hand contend that the School District has violated several procedural requirements

of federal and state law by determining Erika Schuldt's educational placement for the 1988-89 school year outside the team process, before the IEP team developed program appropriate to meet Erika's present needs, and without giving the Parents proper notice. The School District denies that it has failed to comply with any applicable procedural requirements and argues that the procedural requirements cited by the Parents do not apply in this case.

At the heart of the School District's argument is the assertion that the School District did not propose or make a change of placement or refuse to make a change a placement with regard to Erika's transition from a 1987-88 early childhood special education transition program to a 1988-89 regular, integrated kindergarten program. The School District claims that, for this reason, it was not required to give the Parents prior written notice or to implement other procedural due process requirements.

The School District's reasoning relies heavily upon the decision of the 2nd Circuit Court of Appeals in *Concerned Parents, supra*, wherein the Court held that a transfer of handicapped students from special classes at one school location to the same type of special classes at another school location within the same school district did not constitute a change of placement which would trigger the prior notice due process requirements. The Court in *Concerned Parents* construed the term "educational placement," which is not specifically defined in the EHA, to refer only to the general type of educational program in which a child is placed, and construed the phrase "change in education placement" to "encompass only decisions to transfer child from one type of program to another." *Concerned Parents, supra* at 753-754. Applying this reasoning, a mere change in the location of services when the nature of the educational program remains

constant could be insufficient to trigger the prior notice requirements.

The School District asserts that the holdings in *Concerned Parents, supra*, and *Lunceford v. District of Columbia Board of Education*, 745 F.2d 1577 (1984), lead to the conclusion that no change in educational placement is involved in the present case. In *Lunceford*, the Court adopted the reasoning of *Concerned Parents* and hold that, "at a minimum, a fundamental change in, or elimination of a basic element of the educational program" must be identified in order for a change to qualify as a change in educational placement. *Lunceford, supra*, at 1582. The *Lunceford* case addressed the transfer of a child from a residential private hospital to a government-run institution where the daytime educational program remained the same. The Court held that a mere change in the child's feeding program was insufficient to constitute a change in educational placement. In the

present case, the School District argues that the change in the location of Erika's services is a minor change within the discretion of the District, that Erika has experienced nothing more than a normal grade progression, and that there has been no fundamental change or elimination of a basic element of her educational program or placement which would trigger the application of the prior notice and other procedural requirements. The evidence presented demonstrates that the School District's argument is without merit.

Erika's transition from a special education classroom to a regular kindergarten classroom has involved fundamental changes in her special education program. For example, whereas the 1987-88 IEP called for level IV services, including a full-time special education teacher and 50 minutes per week of direct adaptive physical education services, the 1988-89 IEP calls for Erika to be educated full-time by a regular education teacher with the assistance of a behavior

management aide, and for Erika to attend regular physical education classes, supplemented by consultations with an adaptive physical education teacher two times per month. Erika continues to receive direct physical and occupational therapy services through an extended day program, with a decrease in the amount of time set aside for physical therapy. These changes in Erika's special education program are substantial and trigger the application of the prior notice duo process provisions. They do not represent mere minor adjustments in an ongoing special education program. The overall type of program and placement has changed.

The transition program attended by Erika during the 1987-88 school year is an early childhood special education program designed exclusively for special education students. It is a district-wide program, held in only one elementary school location per year. In contrast, the 1988-89 kindergarten class in which Erika now participates is a regular,

integrated kindergarten program, not a special education program. Regular kindergarten classes are offered throughout the School District at several different elementary schools, each of which houses multiple kindergarten class sections. The change involved here is not a mere change of location. Erika's transition from a pre-school special education classroom to a regular, fully integrated kindergarten classroom, supplemented by support services, constitutes a fundamental change in placement and clearly triggers the prior notice requirements sot forth in the EHA and state law. 34 C.F.R. §§ 300.504, 300.505, Minn. Rule Parts 3525.2900, 3525.3600. The fact that Erika's transition from a special education program to a regular education program was anticipated by the Parents and the School District during the prior school year does not alter this outcome.

Because Erika's placement has changed from a single site preschool special education program to a multiple site

integrated, regular kindergarten program supplemented by special education services, the determination of location of services, in this instance, is not a minor change solely within the discretion of School District administrators. Erika's kindergarten placement marks the start of her regular, integrated public elementary school program, a seven year program consisting of kindergarten through grade 6. Once the location of services is selected, presumably both the Parents and the School District would prefer to continue Erika's elementary program at the same location, if at all possible. During the 1987-88 school year, the School District and the Parents not only anticipated that Erika would make a transition to the regular education program, both parties also anticipated that Erika would attend kindergarten classes at Roosevelt Elementary -- not just because this is the school Erika would attend if not handicapped, but because it is the Mankato School District's long-standing and stated policy to

place handicapped children in their neighborhood schools whenever possible. Erika's transition class teacher, Ms. Wakefield, testified that the 1987-88 IEP team recommended during that school year that Erika be placed at Roosevelt. The School District's decision to deviate from its regular placement policy regarding location of services and instead, to propose and then determine to place Erika at another school location at the onset of her kindergarten through grade 6 educational program, constitutes a significant placement issue. Pursuant to 34 C.F.R. §§ 300.504 and .505, and Minn. Rule Part 3525.2900, Subps. 3D and 5, the Parents were entitled to prior notice of the proposed change in Erika's placement, including location of service.

The School District has failed to meet its burden of proof that it has complied with the prior notice and other procedural requirements which are triggered when a change in educational placement is proposed or made. Federal and

state laws require that a placement proposal embodied within a proposed IEP must be based on a child's program needs in accordance with the principle of least restrictive alternatives. 34 C.F.R. 5 300.552; 34 C.F.R. Part 300, App. C, Question 42; Minn. Rule Part 3525.2900, Subp. 3. Indeed, Minn. Rule Part 3525.2900, Subp. 3 D, requires a school district to substantiate, in accordance with the principle of least restrictive alternatives, why a proposed placement, including location, is the most appropriate in terms of a child's educational needs. The federal regulation, 34 C.F.R. § 300.552, requires not only that the placement be based on the child's IEP, but that unless the IEP requires another arrangement, the child shall be educated in the school which she would attend if not handicapped. A placement determination, including location of services, cannot be determined until after the designated staffing team has reached a determination as to the child's present performance level and program service needs

and developed the program plan. Otherwise, an effective analysis of whether a proposed placement provides an appropriate public education in the least restrictive environment cannot be accomplished.

The importance of the order in which these matters are addressed is emphasized by Minn. Rule Part 3525.2900, Subp. 5, which specifically requires that the child's program plan be completed before the parents are served with notice of a proposed change in placement. Accordingly, the School District must, on an annual basis, determine Erika's performance level and her special education service needs as determined by the designated IEP team, including the Parents, and develop a program plan, before making placement determinations, including determinations about the location of services. Parental involvement in the decision-making process, including placement considerations, is specifically guaranteed in federal and state law. 34 C.F.R. §§ 300.344,

.345, .504,.505; Minn. Stat. § 120.17, Subd. 3a (3); Minn. Rule Part 3525.0700. The preponderance of the evidence demonstrates that the School District failed to meet these requirements and, instead, attempted to resolve the matter of the location of placement before Erika's program plan for 1988-89 was developed, without proper staffing team and parent participation.

In its June 16, 1988 letter to the Parents, the School District proposed three elementary school sites for the 1988-89 school year. (School District Ex. 13.) Then, in its September 1, 1988 memorandum to the Parents, the School District made a specific placement determination, informing the Parents that Washington Elementary School was the appropriate placement for Erika's 1988-89 kindergarten program. (School District Ex. 15.) The June proposals and the September Washington Elementary placement determination were made outside the team planning process, before

Erika's performance level, program service needs and instructional goals and objectives for her 1988-89 IEP had been evaluated and determined by the IEP team, thereby excluding proper input from the IEP team, including the Parents. (Even if one interprets either or both of these communications as refusals to make a proposed change in placement in accordance with the parents' stated placement location preference, the resulting analysis would remain the same, i.e., the same procedural requirements would be triggered.)

The June 16th letter prepared by Mr. McFarling was the first written notice received by the Parents of the School District's proposals for the location of placement and the only notice received prior to September 1, 1988. The School District did not attach a copy the IEP in which the proposals were based (as it had not yet been drafted), did not provide an explanation of procedural safeguards, and did not describe

other placement options considered and why they were rejected, or other factors which were relevant to the proposals. The September 1st memorandum was accompanied by a notice of procedural safeguards, but did not adequately describe other options considered and why they were rejected or other factors relevant to the decision or include the IEP upon which the placement determination was based (again, because it had not yet been formulated). The School District did not disclose in the memorandum that it had hired an architect to evaluate the structural accessibility of Roosevelt or that it had relied upon the evaluation report of that architect when making its determination. These communications constitute improper notices under both the federal and state prior notice provisions, because they were made prior to the development of the 1988-89 program plan and because they failed to meet other content of notice requirements. 34 C.F.R. § 300.505 and Minn. Rule Parts 3525.3600, 3525.2900.

School District administrators testified at length about the many discussions the Special Education Director and the Assistant Special Education Director had with various staff members, other administrators, and the Parents, to gather information concerning the placement determination. While these individual communications were in no way prohibited by the federal or state procedural requirements and may have been useful, they did not serve as substitutes for the federal and state mandated decision-making process for the development of an annual IEP and placement determination. In the September 1, 1988 memorandum which informed the Parents of the District's decision to place Erika at Washington Elementary School, the School District listed several reasons for the selected placement location, presumably to substantiate, in accordance with the principle of least restrictive alternatives, why it was appropriate in terms of Erika's needs. However, no substantiation can be deemed sufficient under

the governing law when it is provided prior to the team's development of the program portion of the proposed IEP.

The School District also violated federal and state procedural due process requirements with regard to the October 25th IEP planning meeting. When this IEP meeting was finally held on October 25, 1988, Ms. Watson, the Assistant Special Education Director who chaired the meeting, did not provide the team with an opportunity to discuss, as a team, the issue of location of services. No substantive discussion as allowed on this subject. There was therefore no discussion about the accessibility of the Roosevelt site. No determination was made by the IEP planning team that Erika's needs could best be met at Kennedy. That determination was made separately and without team input by the District's Special Education Director, Mr. McFarling. Mr. McFarling, who has never been a member of Erika s IEP team and has never participated in any of her IEP team

meetings, later added the section that pertains to location of services to the proposed IEP the placement location discussion contained in the proposed IEP, School District Ex 6, is virtually identical in content to the content of Mr McFarling's September 1 memorandum, except that Kennedy Elementary School is substituted in the text where Washington Elementary School had previously appeared. The preponderance of the evidence shows that the School District made its October, 1988 placement proposal without team input, outside the team process, and before the program plan was developed.

The School District argues that any procedural errors it made were harmless, but the above discussion clearly indicates otherwise. The development of Erika's 1988-89 program plan could have been accomplished during the late spring or summer of 1988 and certainly before the start of the 1988-89 school year. The federal regulations indicate an IEP

should be in effect prior to the start of each school year. Implied is that the IEP in effect at the start of a school year should be the IEP developed for that current school year, and not the prior year's IEP. See Comment to 34 C.F.R. § 300.343 (July 1, 1986), at 34-35. The School District knew during the latter half of the 1987-88 school year that Erika's new educational placement would require a determination about placement location, irrespective of the Parents' expression of a preference for Roosevelt. By failing to develop Erika's program plan before making its placement proposals and placement determination, by failing to develop the program plan in advance of the start of the 1988-89 school year, by failing to provide the Parents with proper notice, and by deviating from the team decision-making process, the School District excluded IEP team members, including the Parents, from meaningful participation in the determination of Erika's kindergarten educational placement.

2. Whether the School District Has Met Its Burden of Proof That It Has Provided Erika Schuldt With a Free, Appropriate Public Education in the Least Restrictive Environment.

In the *Rowley* case, *supra*, the U.S. Supreme Court adopted a two part test to determine whether a free, appropriate public education has been provided. Under the test, even if the proposed program is found to have provided "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction," the IEP cannot be deemed appropriate if it is procedurally flawed. *Rowley, supra*, at 102 S.Ct. at 3049. As discussed above, there have been several significant procedural violations by the School District in the present case. Pursuant to *Rowley, supra*, and *Hall by Hall v. Vance, supra*, the School District has failed to demonstrate overall compliance with the Act.

This reasoning was upheld in a recent case, *Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988), wherein the Fourth Circuit Court of Appeals held that the Henrico school system violated both the procedural requirements of the EHA and the spirit and intent of the Act by making a placement determination involving the transfer of a severely retarded student from a residential facility to a local public school before developing the student's IEP. 34 C.F.R. § 300.552. The *Spielberg* Court held that the school system's failure to comply with the procedural requirements of the EHA was sufficient to prevent the school system from providing the student with a "free appropriate public education" under the Act. *Hall, supra* at 635.

As in *Spielberg*, the School District in the present case made a placement proposal and determination transferring Erika from one type of educational placement, a special education program, to another type of educational placement,

a regular, integrated education program, before developing her IEP. As in *Spielberg*, the procedural flaws in the present case have prevented the School District from providing Erika Schuldt with a free, appropriate public education.

Even if the School District could demonstrate that it has followed the appropriate procedures, and even if it could demonstrate that it has provided Erika with a free, appropriate educational program, the School District must also meet its burden of proof that it has provided Erika's program in the least restrictive environment. In *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), cert. denied, 464 U.S. 864 (1983), the 6th Circuit held that while the EHA does not require mainstreaming in every case, the EHA requires mainstreaming to the maximum extent appropriate, thereby indicating a strong congressional preference for mainstreaming. The federal regulations which set forth the least restrictive environment requirements are found at 34 C.F.R.

§ 300.500 to 300.552. The state rules which set forth the least restrictive alternative requirements are found at Minn. Rule Parts 3525.0400, 3525.2900, Subp. 2(B), 3525.3900, Subps. D and E, and 3525.4400, Subp. 3. The School District asserts that the proposed Kennedy Elementary placement provides Erika with maximum mainstreaming opportunities and that it complies with least restrictive environment requirements set forth above.

Among the main questions that must be addressed when assessing whether a school system has provided an appropriate education in the least restrictive environment is whether the particular child, in this case, Erika Schuldt, has been appropriately placed. Placement decisions must be made on an individual basis, taking the unique needs of the child into consideration. Comment, 34 C.F.R. § 300.552. The appropriate inquiry under the EHA "is not the number of schools within a school district which are accessible, but

rather whether each handicapped child within a district is appropriately placed." 1980 Office of Special Education Policy Letter, 2 EHLR 211:249 (1980).

The School District contends that 34 C.F.R. § 300.552 doesn't apply to the case at hand, arguing that it has not been incorporated into Minnesota law, and that it only has application to proposals involving children outside the mainstream in distant or segregated placements. This argument must fail. An examination of 34 C.F.R. § 300.552 (a) and (c) reveals no such limitations as claimed by the School District and no case law has been shown to support the District's argument. The federal regulation itself clearly states that each school district shall insure that a child shall attend the school he or she would attend if not handicapped unless the child's IEP requires some other arrangement. (The Commissioner of Education specifically applied this provision in *In the matter of Molly Tessar v. Independent School District No 621.*

Mounds View, Minnesota, (April 26, 1988),-_ EHLR _ .) No distinction is made in this regulation between children in different types of placements.

The School District's argument that 34 C.F.R. § 300.552 has not been incorporated into state law is without merit. To the contrary, state law is incorporated by reference into the federal requirement of a free appropriate public education. 34 C.F.R. § 300.4. When a conflict between the federal and state law occurs, the procedural safeguards set forth in the EHA supersedes the state provisions. *Voqel v. School Board of Montrose R-14 School District*, 491 F. Supp. 989,993 (W.D. MO. 1980). The School District is bound to comply with the requirements of both state and federal law. Accordingly, the least restrictive alternatives language of Minn. Rule Part 3525.4400, Subp. 3, and the other state rules which address this issue, must be read in conjunction with the

least restrictive environment language of 34 C.F.R. §§ 300.550 and 300.552.

Alternatively, the School District argues that if 34 C.F.R. § 300.552 does apply to the present case, the School District has fully complied with its requirements. The School District asserts that it was only after fully considering the possibility of placing Erika at her neighborhood school, Roosevelt Elementary, and determining that her needs could not be met there and that her educational program required an alternative arrangement, that the School District proposed alternative placement locations. This assertion is simply not supported by the evidence presented.

The June 16, 1988 letter to the Parents, School District Ex. 13, - constituted the School District's first written notice of a proposal (albeit inadequate) to place Erika somewhere other than Roosevelt. At the time this letter was written, the School District had not yet hired Mr. Skaar to

evaluate whether structural modifications could be made to the Roosevelt building which would make it fully accessible. Mr. McFarling, the Special Education Director for the School District, testified that he had already concluded by the end of May or early June, 1988, at the latest, that the Roosevelt site could not be made accessible. He testified that this conclusion was evident simply from his visual examination of the building. The Assistant Special Education Director, Ms. Watson, gave similar testimony, to the effect that she had concluded during the late spring of 1988, based on her visual inspection, that the passageway between the kindergarten area and the first floor classrooms was too steep to ramp and that the Roosevelt site could not be made accessible for Erika. These facts and this chronology alone clearly show that the School District did not fully consider a Roosevelt placement before making alternative proposals.

It is clear from School District Ex. 13 that the School District relied mainly on the advice of counsel in June, 1988, when it first informed the Parents of its decision to propose three elementary school sites, not including Roosevelt. Again, the timing and content of the June 16th letter supports the conclusion that this School District did not fully consider a Roosevelt placement before making these proposals.

Reviewing the School District's conduct from June through October 25, 1988, when the proposed 1988-89 IEP was drafted, proposing placement at Kennedy Elementary (School District Ex. 6), there is considerable evidence to support the same conclusion. Placement considerations, including location of services, are components of the development of a child's IEP and as such, are to be considered by the program team, in a team meeting, after the program plan has been developed. The School District excluded proper team input, as set forth in the governing state and federal

procedural requirements discussed above. This exclusion prevented the full consideration of a Roosevelt placement. Individual meetings between administrators and staff or the Parents were not valid substitutes for the mandated procedures.

No team meetings consisting of the Parents, Erika's teachers and special education service providers, and a school administrator were held between March of 1988 and October 25, 1988, to discuss the limitations of the Roosevelt site and to determine whether those limitations could be resolved and/or whether Erika's educational program required another arrangement. In fact, some of the concerns raised by the School District, such as the need to set aside storage and private therapy space, and a place to change Erika's clothing in the event of an accident, were brought to the Parents' attention for the first time at the hearing on this matter. The School District failed to provide an opportunity for the team

to examine these issues and instead, prevented team review of these and other service considerations.

Both the testimony and the Administrative Law Judge's visual inspection of the Roosevelt building, as requested by the parties, revealed that storage, private therapy and changing space can be made available at Roosevelt, and that these are not insurmountable problems or barriers. The evidence presented and the visual inspection supported the conclusion that the empty afternoon kindergarten room, while sometimes used for other school activities, could be used for private therapy and changing space without necessitating costly expenditures or interfering with the surrounding kindergarten environment. Storage space for Erika's equipment might be available in one of the kindergarten closets, if re-organized; if not, storage space appeared to be available in other storage areas within the building, such as one of the closets across from the cafeteria/gym. The School District

has failed to meet its burden of proof by a preponderance of the evidence that Erika's unique educational needs cannot be satisfactorily accomplished in the neighborhood school and require another arrangement.

In *Springdale School District No. 50 v. Grace*, 693 F.2d 4~, 42 ~th Cir. 1982), the Eighth Circuit Court of Appeals held that a School District could not require a hearing-impaired child to attend the State School for the Deaf, even though the State School had an already established and superior program. The School District was required to permit the child to attend her neighborhood school since the IEP implemented there was reasonably calculated to allow her to receive educational benefits and was consistent with the mainstreaming requirements of the EHA. The reasoning in *Springdale* applies to the case at hand. The School District argues, as did the School District in *Springdale*, that even if Roosevelt can be made accessible for Erika, (the School

District concedes this point in School District Exs. 6 and 15), it can never be as appropriate as some other schools within the School District, such as Kennedy and Washington Elementary Schools. But the basis on which the placement determination is to be made under the EHA is not which school is most accessible/appropriate or more accessible/appropriate but rather, whether Erika's IEP, if implemented at Roosevelt, could be reasonably calculated to meet her educational needs.

As noted above, the greater weight of the evidence shows that Erika's educational needs can be met at Roosevelt. The content of Erika's educational program is a regular kindergarten curriculum, available at any of the School District's elementary schools. the potential problems with a placement at Roosevelt center on the provision of Erika's supplemental special education services and her mobility within the building. The first concern is essentially a space

consideration -- whether Roosevelt can provide suitable space for the provision of Erika's special education services; the second concern can be addressed by making the suggested structural modifications. None of the space considerations have been demonstrated to be insurmountable, and both Mr. Skaar and Ms. Quarvee-Peterson agreed that the Roosevelt building could be structurally modified to provide full handicapped accessibility. They also agreed that the necessary modifications could be implemented in phases, if the School District chose to proceed in that manner. There are various options available with regard to the structural modifications needed which, from a cost and feasibility standpoint, need to be further investigated and choices made. However, access to all floors has been shown to be possible at a cost within the resources available to the School District.

The School District looks to *Pinkerton v. Move*, 509 F. Supp. 107 (W.D. Va., 1981), for support, but the facts in

that case are distinguishable. In *Pinkerton*, the School District placed a child in an already existing, self-contained classroom at a central school location and rejected the creation of a new self-contained classroom and placement in the school nearest to the child's home. In that case, however, cost was a major factor. The *Pinkerton* Court held that the School District made a reasonable accommodation because of the cost considerations involved, the small number of students within the school district in need of self-contained classrooms, and the short additional commuting distance. In the present case, the School District's main witness testified that cost was not a factor, that the School District had the resources to make the structural modifications and that if the School District had concluded that the Roosevelt school building could have been made accessible it would have expended the funds to do so. Furthermore, the modifications made to the Roosevelt building would potentially benefit not only Erika, but any

elementary aged child within that attendance area, and potentially throughout the west service area of the school district, where no elementary schools serving all grades, K-6, are currently handicapped accessible.

The School District cites the case of *A.W. v. Northwest R-I School District*, 813 F.2d 158 (8th Cir. 1987), which is also distinguishable on the facts. As in *Pinkerton*, supra, this case involved a child whose needs required a self-contained classroom and cost was again a major factor. The Court concluded that the child in *A.W.* would derive little or no benefit from an integrated placement with non-handicapped peers and concluded that the costs were not justified. In the present case, as noted above, cost is not an insurmountable obstacle. Furthermore, unlike the situation in *A.W.*, the potential socialization benefits for Erika from being able to attend her neighborhood school are significant. Additionally, Erika's parents have not requested the duplica-

tion of a special program; as conceded by the School District, Erika's current educational program needs can be met at any of the District's elementary school programs.

The School District argues that Section 504 of the Rehabilitation Act of 1973 applies to this case. However, in *Smith v. Robinson*, 468 U.S. g92 (1984), the U.S. Supreme Court held that Congress did not intend to have the comprehensive and specifically required procedural scheme set forth in the EHA circumvented by resort to the more general provisions of Section 504. 468 U.S. at 1016. The Court concluded that the remedies, rights and procedures contained in the EHA are the ones intended to apply to a handicapped child's claim to a free appropriate public education. 468 U.S. at 1019. The present action was brought pursuant to the EHA, not Section 504, and compliance with Section 504 is not an issue in this matter.

Based on the evidence presented and for the many reasons set forth above, the Administrative Law Judge is persuaded that the School District has failed to meet its burden of proof, that the proposed IEP does not fully comply with the applicable procedural provisions of law and therefore does not constitute an appropriate public education, and that the IEP placement does not constitute the least restrictive environment. The decision in this matter, in accordance with Minn. Rule Part 3525.4400, Subp.5, is that the proposed action cannot be sustained.

S.R.W.

Appendix G

Addendum of Statutes and Regulations

§ 615 of the Education of the Handicapped Act, 20 U.S.C. §1415(a)(b)

(a) *Establishment and maintenance*

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) *Required procedures; hearing*

(1) The procedures required by this section shall include, but shall not be limited to --

(C) written prior notice to the parents or guardian of the child whenever such agency or unit --

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

§ 615 of the Education of the Handicapped Act, 20 U.S.C. § 1415(e)(2):

Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any state court of competent jurisdiction or in a district court of the

United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Regulations of the United States Department of Education Enforcing the Education of the Handicapped Act, 34 C.F.R. Part 300 --

§ 300.1 *Purpose*

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs,

(b) To insure that the rights of handicapped children and their parents are protected,

(c) To assist states and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

§ 300.277 ***Participation in regular education programs.***

(a) Each application shall include procedures to insure that to the maximum extent practicable, and consistent with §§ 300.550-300.553 of Subpart E, the local education agency provides special services to enable handicapped children to participate in regular education programs.

§ 300.346 ***Content of individualized education program.***

The individualized education program for each child must include:. . . .

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular education programs. . . .

§ 300.550 ***General.***

(b) Each public agency shall insure:. . . .

(2) That special classes, separate schooling or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

§ 300.552 ***Placements.***

Each public agency shall insure that:

(a) Each handicapped child's educational placement:. . . .

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home. . . .

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped. . . .

Comment. . . . The overriding rule in this section is that placement decisions must be made on an individual basis. . . .

§ 615 of the Education of the Handicapped Act 20 U.S.C. § 1406

Grants for removal of architectural barriers; authorization of appropriations

(a) The Secretary is authorized to make grants and to enter into cooperative agreements with the Secretary of the Interior and with State educational agencies to assist such agencies in making grants to local educational agencies or intermediate educational units to pay part or all of the cost of altering existing buildings and equipment in accordance with standards promulgated under the Act entitled "An Act to insure that certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped," approved August 12, 1968.

(b) For the purposes of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.

(Pub. L. 91-230, title VI, Sec. 607, as added Pub. L. 94-142, Sec 6(a), Nov. 29, 1975, 89 Stat. 795, and amended Pub. L. 98-199, Secs. 3(b), 5, Dec. 2, 1983, 97 Stat. 1358; Pub. L.

99-457, title IV, Sec. 401, Oct. 8, 1986, 100 Stat. 1172; Pub. L. 100-630, title I, Sec. 101(c), Nov. 7, 1988, 102 Stat. 3290)

FILED
DEC 18 1991
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(2)

No. 91-826

In the
Supreme Court of the United States
October Term, 1991

MARY SCHULDT and DOUGLAS SCHULDT
on behalf of themselves and their minor daughter,
ERIKA SCHULDT,

Petitioners,

v.

MANKATO INDEPENDENT SCHOOL DISTRICT NO. 77,

Respondent.

BRIEF IN OPPOSITION TO A PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below neither required Petitioners to re-exhaust their administrative remedies nor adopted a standard of law in conflict with decisions of this court or any other circuit court.

2. Whether the court's decision below did not create a conflict with decisions of this court or other circuit courts regarding the effect of procedural errors upon provision of a free appropriate public education.

3. Whether the court below did not adopt a cost-benefit analysis thus its decision did not conflict with decisions of other circuit courts or administrative agencies.

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STATEMENT OF THE CASE

Minnesota's Commissioner of Education, reviewing the decision of the hearing officer following the local hearing, concluded that the school district did not fully follow procedural requirements of state and federal law when it proposed and implemented a kindergarten program of education for Erika Schuldt which was put in place as of September 9, 1988. (Pet. App. E-37, et. seq.) Specifically, special education planning team meetings held during the spring and summer of 1988 were not attended by all persons whose attendance was required, written correspondence to the parents was not accompanied by required enclosures reciting parental rights and the individualized educational plan (IEP) meeting was not held until October 25, 1988. None the less, the Commissioner found specifically that the

1988-89 kindergarten program at Kennedy Elementary School did not deny Erika access to specialized instruction and related services, which were individually designed to provide her with educational benefit, and did not deny her right to placement in the least restrictive environment. The Commissioner further held that the school district was not required to make structural modifications to Roosevelt Elementary School in order to make it accessible to Erika because there was an accessible school in the district (Kennedy Elementary School, close to Erika's home which she was then attending). (Pet. App. E-55-57)

The district court affirmed the Commissioner's decision, holding that, notwithstanding the procedural errors, "...the District is providing Erika with a free appropriate public education. Erika is being educated with

non-handicapped students for most of the school day at a school close to her home. She is apparently making satisfactory educational progress." (Pet. App. D-22)

The parents did not contest these facts before the district court, rather they asserted that a placement which was not at the elementary school closest to their home (Roosevelt Elementary School) violated the least restrictive environment requirements of the Education for All Handicapped Children Act of 1975 (20 U.S.C. § 1401 et. seq., at § 1412(B), the "Act"). (Pet. App. D-16) They argued that the Act and its regulations create mandatory standards regarding least restrictive environment which the school district violated when it failed to prove that Erika's IEP required a placement at Kennedy Elementary School.

The parents further sought to create a nexus between the least restrictive

environment requirements and the procedural errors the hearing officer and the Commissioner found by arguing that if the district had followed the procedural requirements, Erika's educational program would have been placed at Roosevelt Elementary School. They requested that the district court direct the school district to place Erika at Roosevelt without any further proceedings. (Pet. App. D-21) That is, petitioners specifically "...waived their possible right to a remand based upon the District's failure to follow the Act's procedural safeguards." (Pet. App. D-15)

The district court rejected the parents' construction of the Act's least restrictive environment requirements, concluding:

> The Act and section 300.552 do not create an absolute duty to place a child in the school closest to her home. Rather, these provisions list factors the school district should

> consider and require only that a student be placed in the school closest to her home that can meet her individual needs. A student's desire to attend another school is not dispositive.

(Pet. App. D-19, 20). It then concluded that the decision that Erika should attend an accessible school other than her neighborhood school would have been the same whether all applicable procedures were followed or not. (Pet. App. D-22)

The district court considered the parents' actual participation in the discussions which led to Erika's placement, the placement's success, the fact that the parents waived any possibility of remand to develope a new IEP and its own conclusion that the school district's decision to place Erika at a school other than her neighborhood school was unaffected by any procedural errors. (Pet. App. D-22) It then

concluded that "[d]irecting the District to place Erika at Roosevelt would be inappropriate under these circumstances":

> Without remanding for the development of a new IEP, an order directing Erika's placement at Roosevelt would violate Rowley's admonition against a court imposing its views of preferable educational methods upon the state.

(Pet. App. D-23, citing Board of Education v. Rowley, 458 U.S. 176, 207 (1982)) In other words "[i]n spite of these procedural defects, the court denied relief because it found that the school district is providing Erika with a free appropriate public education in the least restrictive environment available, thereby complying with the ultimate purpose of the Education for the Handicapped Act." (Pet. App. A-2) "The issue, according to the district court, was not whether the school district followed the procedural requirements, but

whether what it actually did satisfied the requirements of the Education for the Handicapped Act." (Pet. App. A-7)

Before the United States Court of Appeals for the Eighth Circuit, Petitioners argued that the district court erred in refusing to direct the school district to place Erika at Roosevelt Elementary School and in suggesting that the only remedy for the procedural errors would have been to remand for further proceedings. They asserted that, in effect, the district court required them to "re-exhaust" administrative remedies.

The court of appeals, however, agreed with the district court's reasoning and conclusions. "[T]he failure of the school district to comply with procedural requirements, of necessity, would require remand for further consideration." (Pet. App. A-9) It found, moreover, that the

district court "properly reasoned" that without remand an order directing Erika's placement at Roosevelt would violate Rowley's admonition against a court imposing its views of preferable educational methods upon the state (Pet. App. A-10) and that remand was unnecessary because the School District was providing Erika with a free appropriate public education in the least restrictive environment, thereby complying with the Act's objectives. Petitioners, further, had waived the possibility of remand.

ARGUMENT

This case arises under the Education for All Handicapped Children Act, 20 U.S.C. § 1401, et seq. Petitioners have sought, at all levels, Erika's placement at Roosevelt Elementary School, the school she would attend if she was not

handicapped. They argue that the School District violated Erika's right to a free appropriate public education under the Act when it committed certain procedural errors during the process which resulted in her kindergarten placement at Kennedy Elementary School, an accessible school close to her home, for the 1988-89 school year. The District Court and the Court of Appeals found that despite procedural errors Erika had been given a free appropriate public education and declined, therefore, to place her at Roosevelt Elementary School. (Petitioners waived any right to a remand in order to correct procedural errors.)

Petitioners now assert that the decision of the Court of Appeals for the Eighth Circuit conflicts with decisions of this Court and other courts of appeals. As the decision of the Court of Appeals does not create conflict with

this Court or among the circuits, Petitioners are really seeking only another level of review in hopes of achieving a placement at Roosevelt Elementary School. As this does not rise to the level of "special and important" reasons under Supreme Court Rule 10.1, the Petition should be denied.

I. THE COURT BELOW NEITHER REQUIRED PETITIONERS TO RE-EXHAUST THEIR ADMINISTRATIVE REMEDIES NOR ADOPTED A STANDARD OF LAW IN CONFLICT WITH DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT COURT.

Petitioners' assertion of a conflicting standard of law among the circuits is based upon an erroneous reading of the cases which they offer in support of this contention and an inaccurate analysis of the facts below.

A. The District Court had the Power to Remand for the Correction of Procedural Errors, but for Petitioners' Waiver.

Petitioners assert that the decision

below conflicts with decisions of other circuits which, they claim, stand for the proposition "...that once a dispute of this nature reaches a District Court, it should be resolved there." (Petition-16) Petitioners reason that as the district court had authority to grant relief, but declined to grant the specific relief they requested, it did not resolve the dispute. This reasoning ignores the fact that once this dispute reached the District Court it was "resolved there." The court concluded that, notwithstanding any procedural errors, Erika had been provided a free appropriate public education in the least restrictive environment.

Petitioners, moreover, appear to base their argument upon the possibility that the district court might have, but for their waiver, remanded the case to the state reviewing officer or the due

process hearing officer for the purpose of correcting procedural errors. Petitioners cannot base an appeal upon action which a court might have taken had Petitioners not waived their rights.[1]

Petitioner's assertion that the district court lacked the discretion to remand the case in order to correct procedural errors is meritless.

In support of their proposition petitioners cite Muth v. Central Bucks School District, 839 F.2d 113 (3d Cir. 1988). The question before the Court of Appeals for the Third Circuit in Muth was not the propriety of an order of remand by a district court. Rather, it was whether the "impartial review"

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[1]The right of parents represented by counsel to waive procedural rights and protections granted by the EHA was recognized by the Sixth Circuit in the case of Cordrey v. Euckert, 917 F.2d 1460 at 1465 (6th Cir. 1990).

provisions of 34 CFR § 300.512 impose timelines upon state educational or other administrative reviewing agencies for reaching final decisions which, as a practical matter, preclude remand to the local due process hearing officer. Muth, 839 F.2d at 125. The court did not even comment upon the power of federal courts reviewing such decisions to remand the proceedings before them to administrative bodies, including the state educational reviewing agency or the due process hearing officer, for further action.

Petitioners make no reference to any provision of law or to any regulation which imposes a similar limitation upon the alternatives available to a district court reviewing the decision of the state educational or other reviewing agency.

In short, Muth addresses neither the power of a district court to remand a case before it under the EHA nor, and

what is more to the point in these proceedings, the effect of a waiver of the right of remand for the purpose of correcting procedural errors.

At least one circuit court decision has, however, specifically held that district courts have the authority to remand such proceedings to the hearing officer for the correction of procedural errors. Doe v. Smith, 879 F.2d 1340 at 1344 (6th Cir. 1989).

B. The Court of Appeals did not Require Petitioners to Re-exhaust Their Administrative Remedies.

Petitioners argue that the failure of the court of appeals to agree with their interpretation of the Act's least restrictive environment requirements (20 U.S.C. § 1412(B), 34 C.F.R. § 300.550-56) and to order an educational placement at Roosevelt Elementary School constituted error because it caused them either to

have to re-exhaust their administrative remedies or to be exposed to the likelihood of having to do so. In support of this argument Petitioners cite DeVries v. Spillane, 853 F.2d 264 (4th Cir. 1988), which arose out of a parent's assertion that a proposed IEP was inappropriate because it did not provide for attendance at the neighborhood school. When the appeal from the decisions of the local due process hearing officer and the state reviewing officer came before the district court, the parent directed her arguments only to a subsequent IEP which had not yet been the subject of administrative hearings. Even though the basis for objection to the subsequent IEP was the same as it was for the IEP which had been subject to administrative review, the district court declined to hear the matter and dismissed

the suit. DeVries v. Fairfax County School Board, 674 F.Supp. 1219 (E.D. Va. 1987). In DeVries the Fourth Circuit held, as Petitioners point out, (Petition-16, 17) that as the parent's objection to the two IEP's was identical, the issue had in fact been considered by the administrative tribunal. Thus, re-exhaustion by requiring the parent to challenge the subsequent IEP through the administrative process was unnecessary and inconsistent with the Act. DeVries, 853 F.2d 264 at 267

The case below does not give rise to the application of the doctrine of re-exhaustion of remedies, however. The IEP for the 1988-89 kindergarten program was the only IEP which Petitioners challenged at any level of these proceedings. Unlike the situation which existed in DeVries, the issue of the appropriateness of that IEP has been

fully litigated on the basis of the only IEP which was contested and the complete record of proceedings brought before the district court and the court of appeals. It will not be necessary for Petitioners to challenge a subsequent IEP in order to determine Erika's right to attend the school which she would otherwise attend if she were not handicapped. Nor have Petitioners attempted to do so. In the proceedings below the district court and the court of appeals promulgated a standard which fully resolved all of the questions Petitioners brought before these courts.

C. The Decision of the Court of Appeals Complies with the Act's Judicial Review Provision.

Finally, Petitioners argue that the decision of the court of appeals below conflicts with the Act's judicial review provision, the pertinent portion of which (20 USC § 1415(e)(2)) is as follows:

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines to be appropriate.

20 U.S.C. § 1415(e)(2) (emphasis supplied). Petitioners have made no claim that the district court did not receive or base its decision upon all of the records of the administrative proceedings. Neither have they claimed that any party to the proceedings before the district court made a request that the court hear additional evidence. Thus, Petitioners' assertion that the Act's judicial review provision was violated comes down to the fact that the court of appeals did not find, despite Petitioners' waiver of the possibility of remand, that the procedural errors precluded a conclusion that a free

appropriate public education had been offered. As discussed above, the decision fully resolved the issue before the court. The failure of Petitioners to agree with the outcome does not change the fact that the court granted the relief it found to be appropriate. Essentially, Petitioners merely restate their "harmless error standard" argument which is discussed below. There is no basis for any conclusion that the decision of the court of appeals, below, has or will require Petitioners to re-exhaust any administrative remedy.

II. THE COURT'S DECISION BELOW DID NOT CREATE A CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS REGARDING THE EFFECT OF PROCEDURAL ERRORS UPON PROVISION OF A FREE APPROPRIATE PUBLIC EDUCATION.

A. Petitioners Waived Consideration of the Effect of any Procedural Errors.

At the time of oral argument before the district court, the district court

assumed for purposes of its deliberations that certain technical procedural violations had taken place. The court emphasized that the practical significance of such errors was of special interest to the court. (Resp. App. A-iv) The court then directed the parents to address the consequence of any procedural violations and asked whether they desired the court to remand for further steps with perfect procedural mechanisms to be taken. The parents stated, however, that they had no interest in remand. They wanted the court to order directly their desired result--modification of Roosevelt Elementary School and Erika's attendance there. (Resp. App. A. iv-vi).

Petitioners do not now assert that they lacked the power to waive enforcement of a right specifically

granted parents by the EHA. (See footnote 1 at p. 12, above).

Directly as the result of this waiver the district court found that it was "... unnecessary to reach this issue." (Pet. App. D-14) The court of appeals agreed that the district court properly "... declined to consider the impact those procedural violations had on Erika because the Schuldts had 'waived their possible right of a remand' during oral argument before the district court." (Pet. App. A-8, 9)

Even if the procedural errors had been grievous in magnitude and effect and even if the circuits had adopted a rule holding that the occurrence of any procedural error precludes the offering of a free appropriate public education, the fact would remain that Petitioners waived consideration of such defects. Petitioners cannot now be heard to

complain that their waiver should not have been accepted or respected. Nor would any such argument of error raise to the level of the "special and important reasons" which are required in order to justify the assertion of jurisdiction by this court (Sup. Ct. R. 10.1). Petitioners assert no law whatsoever in support of such a proposition.

B. Petitioners Cannot Establish a Conflict Among the Circuit Courts with Regard to Harmless Error.

Petitioners assert that the decision of the court of appeals, below, applies a harmless error standard which conflicts with the standards adopted by other circuits. While Petitioners never articulate this standard, they appear to assert that the Fourth and Fifth Circuits have adopted as a rule the proposition that any violation of rights of procedural due process must result in a

finding that a free appropriate public education has been denied. The cases Petitioners cite do not support their argument.

It cannot be denied that under certain specific and limited circumstances (see discussion below) the federal courts have found that the failure to comply with the Act's procedural requirements has resulted in the denial of a free and appropriate public education. Petitioners, however, make no attempt to analyze the circumstances in which the courts have reached such a conclusion. Had Petitioners made such an analysis they might have noted, as did the Court of Appeals for the District of Columbia in Anderson v. District of Columbia, 877 F.2d 1018 at 1021 (D.C. Cir. 1989) that the procedural errors discussed in Fourth Circuit cases holding that the occurrence

of procedural errors caused the denial of a free appropriate public education "...were ones that the court may have viewed as inherently carrying a very high probability of prejudice."

In Hall v. Vance, 774 F.2d 629 (4th Cir. 1985) a school district not only egregiously violated the procedural requirements of the Act but, additionally and significantly, failed to provide a substantively appropriate IEP or an education reasonably calculated to enable the plaintiff to receive educational benefit. Id. at 634, 635. The Court of Appeals for the Fourth Circuit found that under these factual circumstances the failure to meet the procedural requirements of the Act was an adequate basis upon which to base a finding of a denial of a free appropriate public education. The court did not, however,

hold that any or every procedural defect must result in a similar conclusion.

In Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987) the court specifically based its finding that a parent was entitled to receive tuition reimbursement on the school district's failure to offer a program of education which took into account or demonstrated a need for learning disabilities education. While a question of procedural compliance was raised on appeal, the court of appeals expressly found that the school district had complied with the "elaborate" procedural requirements of the Act. The court, rather significantly, then elaborated upon the standard which it had established in Hall:

> Such compliance is critical to the efficient operation of the Act, and serious procedural noncompliance can by itself support a finding that the child has not been provided with a (Free appropriate public education).

Hudson, 828 F.2d at 1063, citing Hall, 774 F.2d 629. Hudson stands for the proposition that in the Fourth Circuit procedural noncompliance must be shown to be serious to support a conclusion that it has caused the denial of a free appropriate public education. In other words, the Fourth Circuit has recognized that not all errors will result in such a conclusion. This appears to be what Petitioners would call a harmless error standard.

In 1978 the Fourth Circuit addressed this issue in Board of Education of the County of Cabell v. Dienelt, 843 F.2d 813 (4th Cir. 1988). This case also involved findings that a school district had committed "grievous procedural defects" while failing to provide a substantively appropriate IEP.

In 1990 the Fourth Circuit again addressed the same issue in Tice v. Botetourt County School Board, 908 F.2d 1200 (4th Cir. 1990). Here parents claimed reimbursement from a school district for several areas of service which they had obtained from private sources. With regard to a claim for the costs of hospitalization this case expressly follows the Hall, Dienelt and Hudson line of decisions: There was a grievous denial of due process in addition to the lack of a substantively appropriate IEP. Tice, 908 F.2d at 1026, 1027.

With regard to a claim for reimbursement for psychotherapy services, however, the court commented:

> ...unlike the situations in Hall and Dienelt, and unlike appellants' claim for expenses incurred during the hospitalization when no IEP was in place, these procedural violations had no impact on whether Matthew's IEP

> adequately assured him of a FAPE.... Accordingly, in order for appellants to prevail on the claim for expenses incurred after this date, they must prevail on the second, more difficult prong of the Rowley inquiry. They must prove that Matthew's IEP, absent psychiatric counseling, was not reasonably calculated to enable him to receive educational benefits.

Tice, 980 F.2d at 1208 (emphasis supplied). Tice stands squarely for the proposition that the Fourth Circuit rule of Hall v. Vance and its progeny is that failure to meet the Act's procedural requirements can be adequate grounds by itself for holding that a school district has failed to provide a free appropriate public education if the severity of the procedural errors is sufficiently grievous. The corollary of this rule, as demonstrated by Hudson and Tice, is that procedural violations which have no impact or a minimal impact on a program of education do not deny a free

appropriate public education. Again, this would appear to be what Petitioners would call a harmless error standard.[2]

Petitioners also discuss the Fourth Circuit's decision in Spielberg v. Henrico, 853 F.2d 256 (4th Cir. 1988) This decision, which preceded Tice by almost two years, is not in any manner or degree inconsistent with the rule of its successor. To the contrary, it is altogether consistent with the holding in Tice: egregious procedural errors which have an adverse impact on the offering of a program of special education can be found to have resulted in the denial of a free appropriate public education.

Even if, solely for purposes of argument, it were to be conceded that the

[2]See also, Burke County Board of Education v. Denton, 895 F.2d 973 at 982 (4th Cir. 1990) (minor procedural facts of a school board were insignificant since they did not cause the child to lose education opportunity.)

Eight Circuit adopted a harmless error standard, there is no conflict between any of the Fourth Circuit cases cited by Petitioners and the Eight Circuit's holding.

Petitioners cite Jackson v. Franklin County School Board, 806 F.2d 625 (5th Cir. 1986), apparently in support of a contention that the Court of Appeals for the Fifth Circuit has adopted a standard for reviewing procedural compliance which conflicts with the holding of the Eighth Circuit below. In this case, however, the Fifth Circuit merely adopts the Hall v. Vance line of cases. That the court recognizes the rule of these cases contemplates the occurrence of harmless error is established by its order. It remanded the matter for the district court to determine whether the procedural error (failure to provide notice and a hearing) had any effect upon the program

of education which the student received. Jackson, 806 F.2d at 631.

Petitioners also make reference to the standard of procedural review in the Sixth Circuit but provide no authority for their discussion. (Petition-23) In Thomas v. Cincinnati Board of Education, 918 F.2d 618 at 625 (6th Cir. 1990), however, the Sixth Circuit made it clear that it has adopted a harmless error standard:

> ...the only error was one of technical noncompliance which did not result in any substantive deprivation. Therefore, the violation cannot be said to amount to prejudicial error."

See also Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990).

C. The Court's Decision Below Does Not Conflict With Rowley.

The leading decision defining the obligation of school districts to provide a free appropriate public education under

the Act is Board of Education v. Rowley, 458 U.S. 175 (1982). Rowley, without any question, recognizes the importance of compliance with the Act's procedural requirements. In fact, procedural compliance becomes the first of the two prongs of the test Rowley establishes for determining whether there has been compliance with the Act's requirements. Id. at 207.

But Rowley contains no language which is inconsistent with the holdings of the Fourth Circuit in Hall v. Vance or its progeny, including the harmless error standard specifically recognized in the Hudson and Tice decisions. In fact, a harbinger of a harmless error standard is found in the following language from Rowley:

> We think the congressional emphasis upon full participation of concerned parties throughout the development of the IEP... demonstrates the legislative

> conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

458 U.S. at 205 (emphasis added).

III. THE COURT BELOW DID NOT ADOPT A COST-BENEFIT ANALYSIS THUS ITS DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OR ADMINISTRATIVE AGENCIES.

The decision of the Court of Appeals did not improperly apply a cost-benefit analysis and is consistent with applicable standards regarding least restrictive environment.

A. The Court of Appeals Did Not Improperly Utilize A Cost-Benefit Analysis.

Petitioners assert that the decision of the court of appeals, below, creates a conflict with the decisions of other circuits because the Court "used the wrong standard--that of a cost-benefit analysis." (Petition-27) Petitioners assert that such an analysis was the

principal basis for the decision of the court of appeals and that such principal reliance constituted error. (Petition-34) The argument seriously misstates the record.

It is true that the decision of the district court makes a brief reference (Pet. App. D-20) to the cost of making the neighborhood school accessible to Erika and the resulting benefit to the student as constituting a consideration which was relevant to the court. As the court of appeals pointed out, however:

> The record does not suggest that the court relied heavily on cost-benefit analysis for its ultimate decision. The court's brief reference to the balancing of cost and benefits only appears once, that reference is in the court's discussion of whether the Education for the Handicapped Act creates an absolute duty to place the child in the school nearest to that child's home.... (Pet. App. A-14, 15) The court was explaining that distance from a child's home is not the determining factor, but only one of several factors a

school district must consider when deciding whether a child's placement complies with the Act and its regulations.

The court of appeals in turn, makes reference to the concept of a cost-benefit analysis primarily for the purpose of setting the record straight by responding to Petitioners' tortured arguments: "the Schuldts take statements from McFarling's testimony out of context and place a strained interpretation on them." (Pet. App. A-15, 16)

B. The Circuts Have Recognized and Approved the Use of a Cost-Benefit Analysis as One Element in Determining Compliance with the Act.

Petitioners, in any event, misconstrue the use to which the courts of appeals have applied the concept of a cost-benefit analysis in determining compliance with the requirements of the Act. As the Eighth Circuit pointed out

in A.W. ex rel. A.W. v. Northwest R-1 School District, 813 F.2d 158, 163 (8th Cir. 1987) the concept of applying a cost-benefit analysis to mainstreaming benefits:

> It consistent with the Supreme Court's conclusion in Rowley that the Act does not require states to provide each handicapped child with the best possible education at public expense, 458 U.S. at 188-189, 102 S.Ct. at 3041-42, and the Court's recognition that available financial resources must be equitably distributed among all handicapped children.

Thus, in Roncker v. Wolter, 700 F.2d 1058 at 1063 (6th Cir. 1983), cert. denied, 464 U.S. 864, the Sixth Circuit observed: "cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children."

Roncker expressly applied the concept of a cost-benefit analysis to the determination of the least restrictive

environment, and even more to the point, the determination of the location of the program of education. N.W. v. A-1 also applies the concept to the determination of the least restrictive environment, again, in the context of the determination of the location of a program of education.

Most recently the Fourth Circuit in the case of Barnett v. Fairfax County School Board, 927 F.2d 146 (4th Cir. 1991) commented:

> Although we agree with Plaintiffs that the Board should not make placement decisions on the basis of financial considerations alone, 'appropriate' does not mean the best possible education that a school district could provide if given access to unlimited funds (citing Rowley, 458 U.S. at 199)...Because the Act requires the state to establish "priorities for providing a free appropriate public education to all handicapped children," we find that Congress intended the states to balance the competing interest of economic necessity, on the one hand, and the special needs

> of a handicapped child, on the other, when making education placement decisions.... Consequently, in reviewing the defendant's placement decision, the district court correctly considered the factors and properly found that the program offered at Annandale was appropriate.

Id. at 154.

It is consistent with the Act to consider cost as one of several factors that a school district must consider when deciding whether a child's placement complies with the Act and its regulations. Petitioners' argument wholly ignores the context in which reference to a cost-benefit analysis was made. Petitioners attempt to portray the decision of the Court of Appeals as being a "simple cost-benefit analysis." (Petition-28) Such a statement seriously mischaracterizes the record.

C. The Decision of the Court of Appeals With Regard to the Location of the Program of Education Complied with the Requirements of the EHA.

The Petitioner's argument attempts to characterize decisions regarding the location of the program of a physically impaired handicapped child as being somehow subject to a different standard than that applicable to other disabilities. The Sixth Circuit in Roncker, Eighth Circuit in A.W. v. Northwest R-1 and Fourth Circuit in Barnett recognize no such distinction. Rather, the nature of a child's disability is one of the factors to be considered in determining compliance with the Act and with the requirement of 34 C.F.R. § 300.552 that unless the "child's (IEP) requires some other arrangement," that the placement be made "in the school (the child) would have attended if not handicapped." But, as the Fourth Circuit noted in Barnett, 927 F.2d 146 at 153 this section has not been interpreted "... as imposing upon a school board an

absolute obligation to place a child in his base school. Rather, this section requires only that a school board take into account, as one factor, the geographical proximity of the placement in making these decisions."

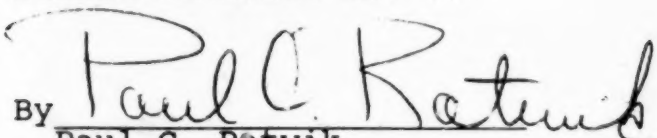
The record below is replete with evidence that the Court of Appeals for the Eighth Circuit complied with this standard.

CONCLUSION

The Court of Appeals' decision below does not conflict in any regard or to any degree with any decision of the circuits or of the Supreme Court. Petitioners have failed to establish any of the "special and important reasons" for the exercise of review pursuant to writ of certiorari Supreme Court Rules 10.1. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MANKATO INDEPENDENT
SCHOOL DISTRICT NO. 77

By 

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APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Mary Schuldt, Douglas Schuldt, on behalf of themselves and their minor daughter, Erika Schuldt, Plaintiffs, -vs- Mankato Independent School District No. 77; and Ruth Randall, in her capacity as Commissioner of the Minnesota Department of Education, Defendants.	4-89 Civil 636
	Minneapolis, Minnesota December 1, 1989 9:15 o'clock a.m.

MOTIONS BEFORE THE COURT

BEFORE THE HONORABLE DIANA E. MURPHY,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Kristin A. Siegesmund
Laurie Davison

For Mankato ISD: Paul C. Ratwik
Susan E. Torgerson

For the Department of Education: Laura E. Mattson

PROCEEDINGS

THE CLERK: Your Honor, the next matter on the calendar is Schuldt versus Mankato Independent School District No. 77 and Ruth Randall. Counsel, please come forward and identify yourselves for the record.

THE COURT: Who's appearing on behalf of the plaintiffs?

MS. SIEGESMUND: I am, Your Honor, Kristin Siegesmund. With me is Laurie Davison.

THE COURT: And for Mankato School District?

MS. TORGERSON: Your Honor, I'm Susan E. Torgerson, appearing on behalf of the School District with co-counsel Paul Ratwik.

MS. MATTSON: My name is Laura Mattson. I'm representing Commissioner Ruth Randall.

THE COURT: Okay. This is a case in which there has been extremely voluminous materials submitted. And the Court is in trial in a criminal case that's scheduled to start again at 10:00 o'clock.

We don't have time for counsel to go over the factual background or to try to discuss all of the issues that are raised in your briefs. The reason that we let you file longer briefs than normal was so that you could go over all of this in the briefs.

So this morning I'd like you to focus your arguments on just the key issues, because there is limited time. And one of the things that occurred to the Court in going over this is, it appears that there were procedural violations. It appears that everybody agrees that not all of the procedural steps or technical things were complied with.

But I'd like you to address the practical significance of that. It doesn't seem that anybody is asking for the case to be remanded for further steps with perfect procedural mechanisms to be taken at that time.

Maybe I'm wrong. Maybe plaintiffs would like it to be remanded to have complete compliance. And so if that's what you're seeking, I'd like to know that.

But I don't want to have a big discussion about these procedural violations here, because it's not clear that there's much consequence at this point. If I'm wrong, you can address that.

And the question of whether it was a proper person that conducted the review, you seem to have briefed that very extensively. Unless you've got some new

authority that you want to cite on that, I don't want you to repeat the arguments that were made in the briefs on that.

Obviously, the key point here is the extent of the obligation to provide an appropriate education in the least restrictive environment. And that that means as far as which school should be required here is the substantive key.

So with that, I turn it over, then, to plaintiff first.

* * *

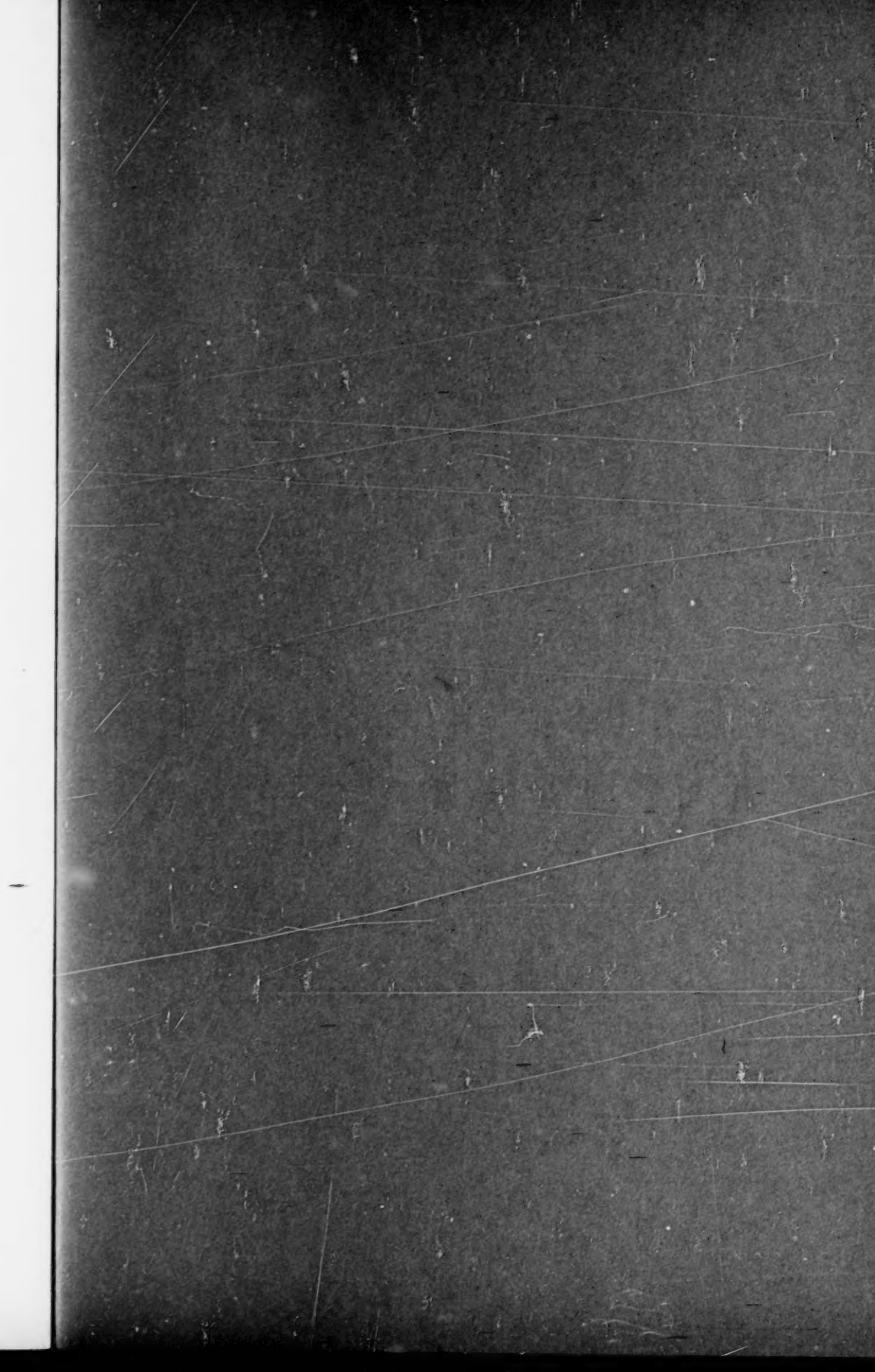
THE COURT: I don't understand you to be asking, though, for the matter to be sent back for them to start anew.

MS. SIEGESMUND: That's exactly right. And the reason is because there's not going to be any difference in the decision.

The team recommended that the child go to Roosevelt and the only reason she

didn't go there was because they didn't want to make it accessible. And to send it back now is, first of all, a waste of time.

We've already waited a year and a half for this to move through the procedural processes. This kid is already in first grade now. It's going to take time to make the building accessible.



Supreme Court, U.S.
FILED
DEC 27 1991
OFFICE OF THE CLERK

91-826

In the Supreme Court of the United States

October Term, 1991

Mary Schuldt and Douglas Schuldt on behalf of themselves and their minor daughter, ERIKA SCHULDT, Petitioners

v.

Mankato Independent School District No. 77, Respondent

Reply to Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Respondents' arguments in opposition serve only to highlight the confusion and conflicting standards that exist among the courts with respect to what remedies are appropriate for violations of the EHA. Understandably, courts have been reluctant to intrude on school district prerogatives and the various levels of reluctance have manifested themselves in different standards. It is clear, however, that Congress did not intend the level of deference given here. The Eighth Circuit has declared that: First, procedural violations of necessity require remand to an administrative tribunal; Second, that violations of the IEP process which Congress unequivocally indicated to be the core of the EHA, are subject to a "harmless error" standard; and Third, that the district courts may apply a cost-benefit analysis in order to uphold the school district's decision. None of these holdings is consistent with the statutory language, its Congressionally

stated intent or the rulings of this Court or other circuit courts of appeals.

Moreover, the level of deference afforded by the Court's ruling made the difference in this case. The Administrative Hearing Officer who heard the testimony of the school district officials and experts concluded that Erika should be placed at her neighborhood school. Accordingly, this case is an excellent vehicle for this Court to resolve the conflicting standards applied in cases involving this critical aspect of the EHA. The remedy afforded to a handicapped child and her family for procedural violations of the EHA, a federal Act, should not turn on the jurisdiction in which the child happens to live.

ARGUMENT

I. The Courts Below Required Erika to "Re-Exhaust" Administrative Proceedings Creating a Conflict with Other Circuit Courts and Contrary to the EHA and *Board of Education v. Rowley.*

Respondent cast Petitioners' argument as a challenge to the district court authority to remand. That is wrong. As Petitioners state, the issue is whether there must be a remand to administrative proceedings for procedural violations of the EHA. Respondent's argument on the remand issue is a red herring. They suggest that Erika "waived" her right to a determination of procedural compliance by the District Court. The exchange set forth in Respondent's Brief is, however, misleading.[1]

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[1] The Court had asked for the "practical effect" of returning the problem to the IEP process to send it "back for them to start anew." (Resp. Brief, App. A-v, vi) Erika's counsel explained that Erika wanted a determination; the matter had dragged on long enough without resolution. Notably absent from Respondent's Appendix is the school district's counsel statement that it was the "belief of the district that only adminis-

(continued...)

The District Court had a responsibility to determine if procedural violations had occurred and to grant relief. *Board of Education v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C. § 1415(e)(2) Instead, the District Court refused to reach the issue, claiming Erika had "waived" her rights. Erika's position is consistent and exactly what this Court envisioned in *Rowley*:

> Judicial review invariably takes more than nine months to complete, not to mention the time consumed during the preceding state administrative hearings. The District Court thus correctly ruled that it retained jurisdiction to grant relief because the alleged deficiencies in the IEP were capable of repetition as to the parties before it yet evading review.

Id. at 188 (Ftnote 9)

The decisions of the Third and Fourth Circuits reinforce this approach. The Respondent tries, without success, to distin-

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[1](...continued)
tration, and not the mandated IEP team could make Erika's placement decision." Dist. Ct. Transcript, at p. 17 So, any return to the IEP process, under the circumstances, would have been futile.

guish *Muth v. Central Bucks School District*, 839 F.2d 1136 (3rd Cir. 1988); *Muth v. Smith*, 646 F. Supp. 280 (E.D.Pa. 1986) and *DeVries v. Spillane*, 853 F.2d 364 (4th Cir. 1988). In *Muth*, the Court reviewed the authority of the district courts to grant relief under 20 U.S.C. § 1415(e)(2). The *Muth* Court recognized the ability and responsibility of courts to do so, when equity demanded it. *Muth v. Central*, *Id.* at 126. Respondent also misunderstands *DeVries*, and argues that because *DeVries* involved more than one IEP, the case is distinguishable from the instant situation. The critical piece of the *DeVries'* decision is that the Court required the need for district courts to make these decisions without requiring parents to return time and again to an administrative process. Here the lower court refused to even reach the issue of procedural compliance unless Erika agreed to start the IEP process anew.

The Eighth Circuit clearly conflicts with these decisions, the Act itself and *Rowley*. It has fashioned a rule that if a disabled child complains of procedural violations, district courts need look no further unless the child agrees to return to those same and sometimes futile proceedings.

The Eighth Circuit stated:

> "Furthermore, the failure of the school district to comply with procedural requirements, of necessity, would require remand for further consideration."

Pet. App. 1-9

The conflict among the Circuits is created by the Eighth Circuit's opinion and is unsupported by the EHA and so requires this Court's review.

II. The Eighth Circuit's Adoption of a Harmless Error Standard and Refusal to Provide Erika a Remedy for Violations of the EHA creates Conflict Among the Circuits and is Contrary to the Act and Decisions of this Court.

A. The Circuit Courts are Divided on the Appropriate Standard to Apply When Procedural Noncompliance is Found.

Respondent takes the surprising position that no conflict exists as to the second question presented because all the circuit courts have adopted a "harmless error" standard. Even if this were true, and it is not, such a standard is contrary to the EHA, clearly expressed Congressional intent and decisions of this Court, and therefore, warrants review.

The Respondent suggests that the Eighth Circuit decision is consistent with the Fifth Circuit. In *Jackson v. Franklin County School Board*, 806 F.2d 625 (5th Cir. 1986), however, the Court held that a school district's failure to convene a conference, and failure to provide written notice

constituted a denial of a free appropriate public education. The *Jackson* Court explained:

> "We agree with the Fourth Circuit in finding that failures to meet the Act's procedural requirements are "adequate grounds by themselves" for holding that the school failed to provide a free appropriate public education, as mandated by the Act."

Id. at 629

The fact that the *Jackson* Court sent the matter back to the district court to determine whether nominal or substantial damages should be awarded does not diminish its finding that the violations resulted in a denial of a free appropriate education.[2]

The Respondent tries to construe the Fourth Circuit cases as consistent with the decision of the Eighth Circuit

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[2] As the Court is no doubt aware, this issue, insofar as placement, may not be settled in the Fifth Circuit, given the recent decision in *Weil v. The Board of Elementary and Secondary Education and the Ousachita Parish School Board*, 931 F.2d. 1069 (5th Cir. 1991), on which the Court recently granted certiorari.

here. But the Fourth Circuit cases are clear. They provide that if the school district engages in the same violations[3] that the Mankato School District did here, there has been a denial of a free appropriate public education. Such violations are not, in the Fourth Circuit, "harmless error." In *Hall by Hall v. Vance Cty. Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985), the school board excluded parents from the team process, failed to advise them of their rights, and did not provide required notices. The Mankato School District committed the same violations by having a single administrator, rather than an IEP team, including the parents, make Erika's placement decision. Yet the Eighth Circuit, unlike the Fourth, found no denial of a free appropriate public education. In *Spielberg v. Henrico*

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[3] The Respondent tries to minimize the violations it committed. The Court is reminded that the Minnesota Commissioner of Education found that "the District unilaterally changed Erika's placement and redesigned a program for her outside the team process required by state and federal law." (Pet. App. at E-40 and F-110)

Public Schools, 853 F.2d 256 (4th Cir. 1988), the Court held that determining a child's placement before developing an IEP was sufficient to deny a free appropriate public education. Here, the Minnesota Commissioner of Education found the Mankato school district had committed this same contravention of the IEP process -- exclusion of the parents from the process. Yet the Eighth Circuit, unlike the Fourth Circuit, affirmed the illegally created placement. Had the violations committed here against Erika been committed by a school district in the Fourth Circuit, there would have been a finding that the child had been denied a free appropriate education, while in the Eighth Circuit they are simply "harmless error."[4]

Nor has the Sixth Circuit adopted the same approach as the Eighth Circuit. In *Thomas v. Cincinnati Board of*

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[4] The Respondent also cites *Tice v. Botecourt County School Board*, 908 F.2d 1200 (4th Cir. 1990) and *Hudson v. Wilson*, 828 F.2d 1059 (4th Cir. 1987). In *Tice*, the Court acknowledged procedural violations but the child essentially did not object to them. In *Hudson*, the Court found procedural compliance.

Education, 918 F.2d 618, at 619 (6th Cir. 1990), that Court re-emphasized its commitment to parental participation:

> "The . . . Act . . . was passed in 1975. . . . Congress concluded that the problem was the result not only of financial constraints at state and local levels but was also due to state and local laws which enabled school districts to exclude children without consultation with their parents."

So, the Sixth Circuit's critical test is first whether or not written notice of an action was provided, and next, can the school district show compliance by proving that the parents did participate in the process? Obviously, the Mankato School District would fail this test because the Schuldts were not included prior to the decision to exclude Erika from Roosevelt. That decision was an edict issued by a single administrator, upon the advice of the school district's attorney. Not until after the decision was made and the Schuldts objected to Erika's exclusion by insisting on their rights were the Schuldts included in negotiations about the already

decided placement. Moreover, the district administration continues to insist that this decision was one for the administration, not the IEP team, including Erika's parents, to discuss and decide.

The Eighth Circuit's decision is also in conflict with the D.C. Circuit. That circuit has ruled that where notice was given, but without the content required by the EHA, the parents did not receive appropriate or sufficient notice. *McKenzie v. Smith*, 248 App. D.C. 287, 1527 (1985) The Eighth Circuit completely ignored Erika's complaint that the brief letter issued by the district administrator failed to meet the notice requirements of the EHA. 34 C.F.R. § 300.504, § 300.505

The impact of these procedural requirements was explained in Petitioners' opening brief, and will not be repeated here. However, as the district court in *Lang v.*

Braintree School Committee, 545 F. Supp. 1221 (U.S. Dist. Ct. MA, 1982) notes:

> ". . . the school [does not] comply with the procedural requirements of the Act by including the parents only in the initial and the penultimate steps of the planning process. Unless they are invited to participate in all significant decisions made by the school, the statutory deference to state and local decision-making in the educational field would not be justified." *Id.* at 1223, Ft. #3 (emphasis added)

The Mankato School District did not include the parents in the significant decision about placement; it kept that decision for its administrator.

For all of these reasons, the Court should grant the Petition for Certiorari and rule on these critical issues. Otherwise, school districts across the country will be empowered to manipulate the IEP process and declare after-the-fact that decisions made outside that process and in violation of its are entitled to deference and need not be remedied because they are "harmless."

B. The Eighth Circuit's Decision is Contrary to the EHA and *Board of Education v. Rowley.*

Respondent makes a poor attempt to argue that *Board of Education v. Rowley*, 458 U.S. 175 (1982) itself permits a harmless error standard. It cites *Rowley's* recognition that "adequate compliance" with the Act's procedures is all Congress required. But "adequate compliance" means compliance nonetheless. The issue here is what remedies are appropriate when violations are found.[5]

Moreover, the *Rowley* Court assumed that a school district would comply with the procedures "giving parents and guardians a large measure of participation at every stage of

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[5] In *Rowley*, unlike this case, there were no findings that the school district failed to comply with the Act's procedures. The parents, unlike the Schuldts, were not excluded from the decision-making process. The school administrators and IEP team met with the Rowleys before the decision was made to deny an interpreter; they even provided an interpreter for a trial period. In contrast, the Mankato District administrator made the decision outside this process; so the school district would not have "adequately complied."

the administrative process." *Id.* at 178. This, the Mankato School District did not do. The Eighth Circuit's affirmation of the school district's activities is contrary to the *Rowley* decision. The Respondent's very suggestion that the acts of the school district here are consistent with the *Rowley* Court speaks to the critical need for the Court to review this case.

III. The Courts Below Adopted a Cost-Benefit Analysis That Conflicts with Decisions of Other Circuit Courts and Administrative Agencies.

Respondent claims that the District Court did not adopt a cost-benefit analysis. Yet, the record is clear that the District Court and the Eighth Circuit considered cost as one reason, indeed the central reason, why Erika could not attend Roosevelt.

The District Court stated:

> "Relevant considerations also include both the cost to the school district and the benefit to the child. *A.W.*, 813 F.2d at 163-64; *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058,

> 1063 (6th Cir.) cert. denied, 464 U.S. 864 (1983). This test is consistent with the Act which qualifies the mainstreaming requirement by stating that it should be implemented to the 'maximum extent appropriate,' 20 U.S.C. § 1412(5), and *Rowley's* acknowledgement that financial resources must be equitably distributed among all handicapped children. *Rowley*, 458 U.S. 176, 193 n. 15; see also *A.W.*, 813 F.2d at 163-64 (collecting cases). (Pet. App. D-20, 21) (emphasis added)

While it is true that the Eighth Circuit claimed this consideration was not the only factor, it does not have to be the only test to be an erroneous test as applied to the issue of accessibility. Moreover, the Eighth Circuit goes on past the passage cited by Respondents (brief at pg. 34) to add:

> "While it is true that the school district did not introduce extensive evidence of the impact the costs of structural modifications would have on the overall budget, the Schuldts themselves introduced substantial testimony on that issue. Moreover, the district court did not need such specific evidence to know that the total funds available to the school district are limited, and it is axiomatic that funds spent modifying Roosevelt must, of necessity, mean a reduction

of funds available for other education related needs. (Pet. App. A-16)[6]

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[6] The only evidence submitted in this case occurred at the due process hearing. The court may judge for itself whether the school district claimed cost was a factor at that time or submitted evidence of its inability to pay the costs of modifications by reviewing the hearing officer's findings of fact at F-72, F-35, F22. The Respondent claims and the lower courts suggested that the Petitioners have misread the testimony of Mr. McFarling concerning cost. This is unfair and misleading. The hearing officer herself posed additional questions about costs to Mr. McFarling. She concluded, in comparing this case with *Pinkerton v. Moye*, 509 F. Supp. 107 (W.D. Va., 1981), that:

> "In that case, however, cost was a major factor. The *Pinkerton* Court held that the School District made a reasonable accommodation because of the cost considerations involved, the small number of students within the school district in need of self-contained classrooms, and the short additional commuting distance. In the present case, the School District's main witness testified that cost was not a factor, that the School District had the resources to make the structural modifications and that if the School District had concluded that the Roosevelt school building could have been made accessible it would have expended the funds to do so." (Pet. App. at F-110)

(continued...)

Yet, the only judge to actually hear the testimony concluded that cost was not a factor to the district and the district could afford to make the school accessible.

Even, if, as the Respondent argues, it was appropriate for the school district and the lower courts to consider cost as a factor in making a placement decision, the decision by the school district was made without knowledge of the financial facts. The school district excluded Erika from Roosevelt on June 16, 1988. The district's architect issued his report on August 29, 1988. (Pet. App. F-27, F-31, F-102)

The critical point is that Respondent suggests some courts have adopted this cost-benefit analysis while Petitioners assert that some courts and administrative agencies have questioned its use in accessibility cases. This being the

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[6](...continued)
Thus, if Petitioners state that the school District claimed cost was not a factor, they are not alone in that interpretation; the only judge to hear live testimony on the matter agreed.

situation, then a conflict certainly exists that is worthy of this Court's review.

Finally, the *Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991) is unlike this situation. There, the court found that the child's program could not be duplicated at the home school because of the scarcity and cost of specialized service providers. In contrast, Erika's program can be provided at Roosevelt. She does not have a special educational program and her therapy needs can be met there. *Barnett* focused on the cost of duplicating services. All of Respondent's argument on this issue is a *post hoc* argument - the kind that would receive strict scrutiny under the appropriate standard.[7]

Based upon the findings of the Federal Office of Special Education, the Act itself, and the interpretations of this court, and other courts and agencies, the Court should

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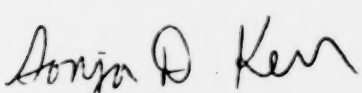
[7] See Hearing Officer's findings of fact. (Pet. App. at F-106)

grant the Petition and explain the standard to use when school accessibility is the issue.

CONCLUSION

For these reasons, and the reasons stated in the Petition, this Court should grant the Petition and review the case.

Respectfully submitted,



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